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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5973

IAN DECO LIGHTBOURNE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

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OPINION BELOW

Petitioner seeks review of the Florida Supreme Court's decision in Lightbourne v. State, 438 So 2d 380 (Fla 1983).

JURISDICTION

Petitioner asserts that review is sought pursuant to 28 U.S.C., § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the Fourth, Sixth and Fourteenth Amendments to the United States Constitution are at issue.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case to the extent given but notes that contrary to Rule 21(h), Rules of the United States Supreme Court, Petitioner has not specified:

> . . . The stage in the proceedings, both in court of first instance and in the appellate court, at which the federal questions sought to be review were raised; the method or manner of raising them and the way in which they were passed upon by the court . . .

Furthermore, Petitioner has not included specific reference or record citation, nor has he appended record excerpts, as required by Rule 21(h) so as to demonstrate to this Court that the specific federal questions asserted were timely and properly raised so as to vest this Court with jurisdiction.

In Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), this Court noted the well established rule that in review of state court judgments this Court would not decide federal constitutional issues which had not previously been asserted and determined by the state appellate court.

In contravention of the Cardinale rule, the Petitioner herein includes within his argument for review two (2)

separate issues which have never been squarely presented to the state appellate court below in the context of a federal question. Specifically, Petitioner, although he does so in Point I of his petition herein, never challenged the admission of the testimony of Theophilus Carson at trial on Sixth Amendment/right to counsel grounds. In fact, a review of Lightbourne's appellate brief reveals that although a Sixth Amendment challenge to the testimony of one Theodore Chavers was asserted on federal constitutional (Sixth Amendment) grounds, no such argument was made with reference to Carson (A 14-17)[1]. Indeed, Petitioner's initial brief specifically limits its suppression argument on that issue to the "... statements made by the Defendant to Chavers"; this fact is further evidenced by the opinion of the Florida Supreme Court in this cause which, in conformance with the Petitioner's state appellate court argument, addresses the Sixth Amendment issue raised only in the context of the testimony of Theodore Chavers, without mention of Theophilus Carson (A 7).

Similarly, the Respondents submit that the specific argument raised in Point III of the instant certiorari petition was likewise inadequate to justify this Court's exercise of certiorari jurisdiction since no specific Sixth Amendment challenge to the admissibility or consideration of the testimony of Carson or Chavers in the Petitioner's capital sentencing proceeding was adequately presented to the state appellate court. Although Petitioner's initial brief did assert that the testimony of Chavers and Carson was inadmissible for the reasons presented in Point IV of his brief (the point in which only Chavers' testimony was questioned on Sixth Amendment grounds) such that their testimony should not be considered as to any aggravating circumstance, the State once again notes that Carson's testimony was never challenged on right-to-counsel grounds in the Petitioner's initial brief (in Point IV thereof). Thus, no Sixth Amendment challenge to the utilization of Carson's testimony for sentencing purposes was likewise ever raised in the Sixth Amendment/federal

[1] (A) refers to the Respondent's Appendix attached hereto.

constitutional question context. This Court's discretionary exercise of certiorari review is accordingly inappropriate in each of the issues outlined.

REASONS FOR NOT GRANTING THE WRIT

(A) PETITIONER HAS DEMONSTRATED NO CONFLICT BETWEEN THE INSTANT FLORIDA SUPREME COURT DECISION AND THIS COURT'S HOLDING IN UNITED STATES V. HENRY[2]; THE STATE APPELLATE COURT PROPERLY APPLIED THE FACTORS ENUMERATED IN HENRY AND DETERMINED UNDER THE PECULIAR FACTS OF THIS CASE THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT A "JAIL-HOUSE INFORMER" WAS NOT A "STATE AGENT"

Petitioner apparently claims that the facts of this case are so "similar" to those in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), that reversal is mandated. This argument fails, however, because of the obvious factual differences between the instant case and Henry, which factual discrepancies the Florida Supreme Court correctly determined distinguished this case from Henry (A 7).

The merits of the arguments notwithstanding, the Respondent submits that the only true questions to be resolved in this cause are factual ones, i.e., the trial court's factual findings (ultimately affirmed by the Florida Supreme Court) that Theodore Chavers was not a "state agent" at the time that Lightbourne made certain jail-house admissions to him such that said admissions could not be attributable to state conduct. This case has no national significance and carries with it virtually no potential precedential value since each such case must necessarily turn on the evidentiary factors present in each specific situation. Here, it is clear from the Florida Supreme Court opinion that said court properly considered and in good faith applied the Henry decision, the factors enumerated therein, and this Court's previous holding in Massiah v. United States, 377 U.S. 201,

[2]United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), to the specific facts of this cause in evaluating and eventually upholding the factual determination first made by the trial court that Chavers was not a state agent and had not acted at the State's behest such that his conduct was not attributable to the State and no "deliberate elicitation of testimony" had taken place to trigger Sixth Amendment protections.

The instant decision does not conflict with this Court's holding in Henry or the Massiah decision but is a determination, like those made by a multitude of other tribunals, that application of the factors outlined in Henry and comparison of the operative facts in each case lead to a conclusion that the facts of the case under review are distinguishable from those which militated the Henry holding such that no Sixth Amendment deprivation through the "deliberate elicitation" of statements from a defendant by the actions of a "state agent" was shown. See, Thomas v. Cox, 708 F.2d F.2d 132 (4th Cir.), cert. denied, 104 S.Ct. 284 (1983); United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983), United States v. Malik, 680 F.2d 1162 (7th Cir. 1982); United States v. Calder, 641 F.2d 76 (2d Cir.), cert. denied, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981).

Furthermore, certain factual assertions made by Petitioner as the basis for his argument are simply unsupported by the record. For example, Lightbourne's claim that Carson was rewarded for information he allegedly "elicited" from the Petitioner is without record basis for Carson did not receive a reduction in his period of incarceration at the behest of law enforcement but had in fact struck a plea bargain in his case before he came forward to tell police of Lightbourne's admissions to him in jail (A 34-37, 45-47). Carson made it clear that he had approached Investigator LaTorre voluntarily without inducement of any kind to give his statement (A 45-47). Investigator LaTorre confirmed the fact that Carson was never induced by the State. He further noted that no agency relationship existed between the State

and Carson; instead, Carson had approached LaTorre to supply the information with absolutely no agreement or understanding that he would receive any compensation, either in the form of money or reduction of jail time (A 34-37, 45-47). In fact, Carson had specifically informed LaTorre that he did not expect any favors and was not looking for anything.

Furthermore, as previously noted, Lightbourne's factual assertion that Carson was an informer "paid by the State to elicit information from the Petitioner" is obviously suspect in light of the fact that he never made any such allegation before the state appellate court, i.e., he never argued that Carson, in violation of Sixth Amendment protections, improperly elicited testimony as a paid governmental agent. Thus, the Florida Supreme Court's opinion contains no rejection of Lightbourne's factual claim of "state agent" status on the part of Carson (since no such argument was ever asserted), instead limiting its factual determination to the contrary to the question of Chavers' testimony (A 7).

Like his factual assertions with reference to Carson, Lightbourne's portrayal of the factual circumstances surrounding Chavers' testimony concerning Lightbourne's jail-house admissions is not an accurate portrayal of the situation. As clearly determined by the Florida Supreme Court, Chavers was not "instructed to gain further information" from Lightbourne despite his assertion to the contrary. In addition, the state appellate court - like the trial court - rejected Lightbourne's, now reasserted, claim that Chavers was "paid to elicit information" and was therefore a state agent. The state appellate court's rejection of said claim was clearly supported by the record which revealed that no promises or inducements were made to Chavers to obtain admissions from Lightbourne.

In fact, the Florida Supreme Court's opinion in this cause is itself indicative of its clear rejection of Lightbourne's factual assertion that Chavers was a state agent and of the state appellate court's proper analysis and

application of the Henry and Massiah decisions to the particular facts in this cause, with specification of those distinguishing facts which set this cause apart from the holding in Henry.

> In Henry the Court found that the informant, Nichols, was acting under instructions as a paid informant for the government. In return for information he was given money and this arrangement was mutually understood. In the instant case there is nothing in the record establishing that the informant Chavers had any prearranged guarantee of money in return for information, and it appears that the two hundred dollars that he did receive from Marion County Sheriff's Department was drawn from a general reward fund and not given as an inducement to elicit information.
>
> Similarly, Investigator LaTorre's advice to the informant Chavers to keep his ears open does not constitute an attempt by the state to deliberately elicit incriminating statements. Without some promise or guarantee of compensation, some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the state's actions in this case to an agency relationship with the informant Chavers.

(A 7) (underscoring supplied)

Respondent submits that the factual circumstances present in Henry are clearly distinguishable from the case sub judice as determined by the Florida Supreme Court. Lightbourne's cellmate Chavers clearly initiated the contact with Investigator LaTorre who had no knowledge whatsoever that Chavers was even in the same cell with Lightbourne. There was no agreement that Chavers would be paid for information on a contingent fee basis or otherwise. Although he did receive a two hundred dollar ($200.00) reward from the Sheriff's Department, that money was given to him pursuant to a general award offered by the Sheriff's Department to any private citizen for information in the cause and was not waived as an inducement or carrot-on-a-stick to motivate or induce Chavers to elicit information. Chavers himself testified that he had been promised nothing by the State and that

he was paid the reward well after he gave the information (A 54,56, 60). Furthermore, Lightbourne's apparent attempt to infer that Chavers was planted in his cell is clearly refuted by Chavers' testimony that he was moved at his own behest to have access to a television and as a result of a dispute with another prisoner (A 48-50, 61-62).

The Florida Supreme Court properly applied the Henry decision in this cause and determined that the holding in Henry was inapplicable to the distinguishable facts of this cause due to the total absence of any state agent status on the part of Chavers. Accordingly, there has been no deviation from precedent in this case, nor conflict shown and certiorari review is therefore inappropriate.

(B) CERTIORARI REVIEW IS INAPPROPRIATE FOR THE FLORIDA SUPREME COURT MADE A PROPER FACTUAL DETERMINATION THAT NO UNCONSTITUTIONAL "STOP" OR "SEIZURE" OCCURRED SUCH THAT SUPPRESSION WAS UNWARRANTED; THE POLICE OFFICER'S CONDUCT AT ISSUE CONSTITTUED A MERE "ENCOUNTER", AND THE ULTIMATE FRISK OF THE PETITIONER WAS JUSTIFIED UNDER THE CIRCUMSTANCES.

The Petitioner reargues the same "form" memorandum of law regarding "stop and frisk" situations which he presented to the trial court and rearuged before the Florida Supreme Court (A 18-33). However, said argument is as inappropriate now as it was at both the state trial and appellate court levels for it fails to address the specific circumstances of this case as well as the factual findings and legal reasoning of the Florida Supreme Court in this case. The state appellate tribunal made a clear factual determination that no "stop" or "seizure" of the Petitioner had occurred in this cause; instead, the court determined that the police conduct at issue constituted a mere "encounter" and was not constitutionally prohibited.

Initially, the Respondent submits that the Petitioner's basic argument constitutes nothing more than a dispute as to

the factual findings made by the state trial and appellate courts, to wit: that officer James McGowan of the Ocala Police Department did not stop, seize, or detain Lightbourne but merely approached the Petitioner's vehicle pursuant to a citizen's call voicing concern and asked Lightbourne a few simple questions which evoked nothing more than the voluntary response and cooperation of the Appellant. Accordingly, Lightbourne's preoccupation with the propriety of the alleged "stop" under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny misses the factual mark in this case. Indeed, while Lightbourne's treatise on "stop and frisk" is informative, it is of no relevance in light of the court's determination that a mere police "encounter" had taken place such that no constitutional deprivation was at issue (A 8-10). This holding is amply supported by the evidence adduced at the motion to suppress hearing.

Officer McGowan testified that at about 8:00 a.m. on January 24, 1981, he was dispatched to investigate a call as to a suspicious car containing a black male (apparently asleep). Upon arrival at the scene, the officer was met by a man (presumably the individual who had made the original call) who asked McGowan to check out the vehicle. The man seemed concerned that the individual inside the vehicle might be sick and with the fact that he had never seen the vehicle in the area before (A 69-71). McGowan approached the car, which was illegally parked on a public street partially obstructing the roadway, from the driver's side and found the Petitioner sleeping on the driver's side of the front seat of the automobile. The Petitioner was covered with a blanket and leaning toward the door; his hands and lap were covered by the blanket. McGowan woke Lightbourne and asked him for identification, and the Petitioner produced a driver's license and explained that he was sleeping off a drunk. McGowan then began running a check of the Petitioner's identification on his radio; however, as he did so, the Petitioner began making

certain furtive movements which put Officer McGowan and Sergeant Becker (who had just arrived at the scene) on alert and in fear for their safety. McGowan testified:

> Q. (By Mr. Simmons) Now, as you were asking these questions of Mr. Lightbourn, were you able to observe what he was doing?
>
> A. He was doing an awful lot of moving. He was fidgeting, moving his right arm a lot like he was impatient or something. He wanted to do something.
>
> Q. (By Mr. Simmons) All right. As a result of the action that you observed Mr. Lightbourn taking, what did you think?
>
> A. (By the Witness) I immediately felt there was something wrong, and I asked him to remove himself from the vehicle.
>
> Q. Why?
>
> A. Something just wasn't right. I -- cover -- The blanket was concealing him and his arm, and I just felt that my safety was in danger, and I just wanted him to remove himself from the vehicle immediately.

(A 74-75).

Sergent Becker, a veteran police officer, had arrived on the scene. In viewing Lightbourne through the windshield of his automobile, he also became concerned for his safety and that of Officer McGowan (A 81-82). Becker stated:

> Q. (By Mr. Simmons) All right. What did you then do?
>
> A. All right. As I first drove up and stopped my cruiser, I could observe Mr. Lightbourn through the windshield of his car. And he seemed to be figiting around.
>
> At that time I exited my vehicle, and from a standing-up position, outside of my car, I could look down through the windshield. And I saw that Mr. Lightbourn had some type of a blanket covering his lap and his arms, and it came up to about here (indicating) on his body.
>
> Q. You are indicating approximately mid chest?
>
> A. Yes, sir.
>
> Q. Now, how was he positioned in his vehicle?
>
> A. He was seated behind the steering wheel, in a normal driver's position. The actions that he was going through aroused immediate concern for myself and Officer McGowen.
>
> Q. Would you describe what those actions were?

A. Yes, sir. To the best of my ability to describe it, he was moving in the vehicle as though he was either trying to put somethign in a pocket, or perhaps taking something out of a pocket. There was a lot of body movement, like this (indicating), and his hands going somewhere underneath the blanket. I was --

Q. All right. Now, what, in your mind, Officer -- or what did those actions mean to you?

A. Well, sir, in my opinion, after being in this four 12 years and just being naturally cautious, the man at 8:00 o'clock in the morning on a lonely, deserted street, making furtive movements with his body concealed, spelled danger for me and my officer. And I had figured that at that point I should get him out of that car and find out whether or not he had some type of weapon on him.

(A 81-82)

Officer McGowan then removed Petitioner from the car and, upon patting him down, discovered the .25 caliber automatic pistol which was subsequently linked to the victim's murder, in Petitioner's jacket pocket. Petitioner was then placed under arrest for carrying a concealed weapon and advised of his rights.

Petitioner's testimony substantiated that of the officers to a great extent; however, he denied being covered by any blanket, although he did state that there was a blanket in the back seat of the car.

Respondent submits that given the facts presented the Florida Supreme Court properly determined that no constitutionally protected interest was infringed by Officer McGowan's investigation of the suspicious vehicle in this case.

In Terry v. Ohio, supra, this Court noted ". . . the myriad daily situations in which policemen and citizens confront each other on the street." 88 S.Ct. at 1875. It was also stated:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred

> We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

Id. at 1879 n. 16.

Mr. Justice White in his concurring opinion explained:

> There is nothing in the constitution which prevents a policeman from addressing questions to anyone on the street. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way.

88 S.Ct. at 1886.

This Court has, as noted by the Florida Supreme Court, determined that there exists a distinction between an intrusion by police amounting to a "seizure" of an individual and a mere "encounter" which intrudes upon no constitutionally protected interest. See, Florida v. Royer, ____ U.S. ____, 103 S.Ct. 1319 (1983) (opinion of White, J.); United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

In Mendenhall, supra, it was stated:

> We adhere to the view that a person is "seized" only when by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976). As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution requires some particularized and objective justified caution.
>
> Moreover, characterizing every street encounter between a citizen and the police as a "seizure" while not enhancing

> any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool and the effective enforcement of the criminal laws . . .

100 S.Ct. at 1877 (opinion of Stewart, J.)

Furthermore, in Royer it was reiterated that:

> . . . Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See Dunaway v. New York, 442 U.S. 200, 210 n. 12, 99 S.Ct. 2248, 2255 n. 12, 60 L.Ed.2d 824 (1979); Terry v. Ohio, 392 U.S. 1, 31, 32-33, 88 S.Ct. 1868, 1885-1886, 20 L.Ed.2d 889 (1968) (Harlan, J., concurring); id., at 34, 88 S.Ct., at 1886 (WHITE, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v. Mendenhall, 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. Terry v. Ohio, supra, 382 U.S., at 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring); id., at 34, 88 S.Ct. at 1886 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. United States v. Mendenhall, supra, 446 U.S., at 556, 100 S.Ct., at 1878 (opinion of Stewart, J.). If there is no detention--no seizure within the meaning of the Fourth Amendment--then no constitutional rights have been infringed.

103 S.Ct. at 1324 (opinion of White, J.)

Furthermore, in Royer (the facts of which involved, inter alia, a request by detectives at an airport that the defendant produce his airline ticket and driver's license which the detectives examined), the Court opined that the "asking for and examining [of] Royer's ticket and his driver's license were no doubt permissible in themselves . . ." but that when considered with the other factors present including the

officer's identification as narcotics agents and the request that he accompany them to the police room indicated that he was effectively seized for purposes of the Fourth Amendment. In this case, however, as properly determined by the state trial and appellate court, there was no indication whatsoever to the Petitioner that he was not free to go or to refuse to answer the simple questions asked by Officer McGowan. Indeed, Lightbourne's only claim of an indicia of a "seizure" was the fact that McGowan had his license, yet as clearly indicated in Royer that isolated factor was properly rejected by the state courts since the request - and Lightbourne's voluntary compliance therewith - were permissible under the circumstances and did not support a finding of an unlawful detention of the Petitioner.

The Resondent submits that Officer McGowan's investigation of the "suspicious" automobile in this case did not constitute an improper "stop" or "seizure" of Lightbourne. Officer McGowan simply asked for identification, imposed a few simple questions to the Petitioner as to his presence in the area, and his correct address. Despite Lightbourne's assertions to the contrary, nothing in the record reveals that he would not have been free to refuse to answer the officers questions and continue on his way; in fact, the Petitioner voluntarily provided McGowan with his license. Furthermore, there is absolutely no indication that the officer displayed a weapon, engaged in any physical coercion, or otherwise indicated to Lightbourne that he was demanding as opposed to requesting his compliance.

Thus, no "stop" or "seizure" of the Petitioner occurred in this case prior to his removal from the car by Officer McGowan to conduct the pat-down search. McGowan was simply performing his duty as a police officer to investigate a citizen's complaint, motivated by a concern that the Petitioner might be in need of assistance. His request for identification and questioning of Lightbourne under the totality of the circumstances and under the authority cited,

did not constitute an unconstitutional seizure under Terry v. Ohio, supra, or its progeny. Having encountered the Petitioner sleeping in a car on a public street as a result of a citizen's complaint, the officer was under a duty to investigate the matter by approaching the Petitioner and briefly questioning him so as to assure himself that the Petitioner was not in need of assistance and to eliminate any alarm or immediate concern with the safety of persons and property in the area.

Finally, given the fact that Officer McGowan's contact with the Petitioner was justified as a result of his investicatorial duties and responsibilities, the ultimate pat-down of the Petitioner was also justified in light of the surrounding circumstances and Officer McGowan's and Sergeant Becker's concern for their own personal safety. It is well established that if during a lawful and temporary encounter between a police officer and a citizen, a reasonable ground is formulated to believe that the citizen is carrying a dangerous weapon, a frisk is justified to protect the officer's safety. Terry v. Ohio, supra. Specific facts which when viewed objectively give rise to a reasonable belief in a prudent experienced officer that the individual might be armed and dangerous clearly justify a pat-down search so as to protect the officer. In Terry, this Court noted that the constitutional propriety of a protracted search for weapons by an officer must necessarily be determined on the particular facts of each case, adding:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience . . . that the persons with whom he is dealing may be armed and presently dangerous, he is entitled with the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

88 S.Ct. at 1884-1885.

If specific and articulable facts cause a reasonable fear for an officer's safety, a pat-down is clearly justified.

In this case, Officer McGowan and Sergeant Becker were legally in the presence of the Petitioner in the pursuit of their duties. The Petitioner's furtive hand movements concealed as they were by a blanket pulled over his body, put both officer McGowan and Sergeant Becker (a twelve (12) year police veteran) in justifiable fear for their safety. The Terry Court noted the danger faced by law enforcement officers stating that it would certainly:

> . . . be unreasonable to require that police officers take unnecessary risks in the performance of their duties . . . Many law enforcement officers are killed in the line of duty and thousands more are wounded . . . In view of these facts, we cannot blind ourselves to the need for law enforcementofficers to protect themselves . . .

88 S.Ct. at 1881.

Respondent submits that law enforcement officers face no less danger now than they did in 1968 when Terry became the law of the land. Indeed, it has unfortunately become almost common to hear of a policeman wounded or killed while approaching vehicles for even mere traffic violations. Can it, therefore, be said that Officer McGowan and Sergeant Becker, noting the unusual, furtive, and concealed movements of the Petitioner while McGowan was checking for previous warrants on Lightbourne, could not reasonably have found themselves in fear for their lives sufficient to justify the limited pat-down search that resulted? Officer McGowan and Sergeant Becker acted legitimately out of concern for their own personal safety in light of the circumstances. Neither the encounter by the officers with the Petitioner nor the subsequent pat-down search were unconstitutional in light of the peculiar facts of this case.

The Petitioner presents no adequate basis justifying the extraordinary remedy of certiorari review.

(C) THE FINDING BY THE TRIAL COURT AS TO THE AGGRAVATING CIRCUMSTANCES AT ISSUE WAS NOT BASED, IN PART, ON IMPROPERLY ADMITTED TESTIMONY AS SHOWN BY PREVIOUS ARGUMENT HEREIN;

CERTIORARI REVIEW OF THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE IS THEREFORE INAPPROPRIATE.

In Point III of the instant petition, Lightbourne relies upon his claim that jail-house informant testimony was improperly admitted (urged as Point I of his petition) in violation of the Sixth Amendment in raising a parallel claim that said testimony was also improperly utilized in the sentencing phase to support a finding of two (2) aggravating factors under Florida's death penalty statutory scheme. However, inasmuch as the argument raised in Point I is without merit and insufficient to justify certiorari review as previously noted in response thereto herein, Lightbourne's improper sentencing claim must also necessarily fail.

CONCLUSION

Based on the above and foregoing arguments and authorities presented, the Respondent prays this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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State of Florida)
County of Volusia) ss:

AFFIDAVIT

I, SEAN DALY, Counsel for Respondent and a member of the Bar of this Court, depose and say:

1. That the enclosed Response to Petition for Writ of Certiorari and accompanying Appendix has been mailed first-class, postage pre-paid, at the United States Post Office, Daytona Beach Branch, on this 20th day of January, 1984;

2. That the Response to Petition for Writ of Certiorari was timely mailed and therefore filed under Rule 28, Section 2, of the Rules of this Court; and

3. That a copy of the above and foregoing Response to Petitioner for Writ of Certiorari and Appendix thereto was likewise mailed first-class, postage pre-paid, on this 20th day of January, 1984, to Jerry T. Lockett, Esquire, Counsel for Petitioner, at Post Office Drawer 1930, Leesburg, Florida 32749-1930.

SEAN DALY
COUNSEL FOR RESPONDENT

Sworn to and Subscribed before me
this 20th day of January, 1984.

NOTARY PUBLIC

Notary Public, State of Florida
My Commission Expires Sept. 15, 1986

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5973

IAN DECO LIGHTBOURNE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

A P P E N D I X

(to Response to Petition for Writ of Certiorari to the Supreme Court of Florida dated January 20, 1984)

JIM SMITH
ATTORNEY GENERAL

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Lightbourne v. State,
438 So.2d 380 (Fla. 1983)

been ignored, it appears that the evidence was considered and rejected. The trial judge need not have expressly addressed each non-statutory mitigating factors in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached.

Because no issue has been raised which warrants reversal of appellant's conviction or sentence, the same are hereby affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD and EHRLICH, JJ., concur.

OVERTON, J., Concurs in the conviction, but concurs in the result only to the sentence.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part, dissenting in part.

I concur in the conviction and all that is said in conjunction thereto, but I would remand for a new sentencing order. The trial judge clearly erred in holding that this homicide was a great risk of danger to many persons. I also disagree with his and the majority's finding that it was proved beyond a reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner. Since there appears some evidence in mitigation relative to the defendant's ignorance, dull mental capacity, and the history of his childhood, and being unable to say with certainty that the sentencing judge would impose the death penalty when he is unaided by the improper aggravating findings, the present sentence should be vacated with instructions to the trial judge to resentence the defendant.

Ian LIGHTBOURNE, Appellant,

v.

STATE of Florida, Appellee.

No. 60871.

Supreme Court of Florida.

Sept. 15, 1983.

Rehearing Denied Oct. 26, 1983.

Defendant was convicted in the Circuit Court, Marion County, William T. Swigert, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) indictment was sufficient to charge murder in the first degree and was not impermissibly vague; (2) defendant's cellmate who testified against defendant at trial was not acting as a paid informant for the Government and thus his testimony regarding statements made by the defendant was properly allowed into evidence; (3) statements made by defendant during interrogation were freely and voluntarily made; and (4) trial court did not err in imposing death sentence upon the defendant in accordance with the advisory recommendation of the jury.

Affirmed.

McDonald, J., concurred in conviction, but dissented from sentence.

Overton, J., filed dissenting opinion.

1. Indictment and Information ⇐87(7)

It is not necessary that indictment or information state exact date of offense if such date is not known; indictment or information in such cases will be deemed sufficient if it is alleged that offense occurred within stated specific time limits. West's F.S.A. RCrP Rule 3.140(d)(3).

2. Indictment and Information ⇐87(7)

Indictment sufficiently charged time of offense and notified defendant of time of murder as specifically as possible where scientific experts could only narrow time of victim's death to a 22½-hour time period. West's F.S.A. RCrP Rule 3.140(d)(3).

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3. Indictment and Information ⇐144.1(1)

Indictment or information will be dismissed for vagueness only if it is so vague, indistinct, and indefinite so as to mislead defendant or embarrass him in preparation of his defense or expose him after conviction or acquittal to substantial danger of new prosecution for same offense. West's F.S.A. RCrP Rule 3.140(o).

4. Indictment and Information ⇐110(17)

Allegations of indictment which tracked statute were sufficient to charge murder in first degree regardless of whether murder was committed with premeditated design or in perpetration of enumerated felonies of burglary and sexual battery; consequently, indictment was not vague or overbroad since it specifically apprised defendant of criminal acts allegedly committed which supported charge. West's F.S.A. § 782.04.

5. Homicide ⇐142(1)

Indictment which clearly incorporated allegation that murder was premeditated in design was not defective on theory that it charged only felony murder and that charging only felony murder and proving premeditated murder is impermissible.

6. Criminal Law ⇐1208.1(6)

Aggravating circumstances to be applied at sentencing stage in capital felony cases need not be originally alleged in indictment in order to confer jurisdiction on court to impose sentence of death.

7. Constitutional Law ⇐52

Statute which fixes penalties for capital felony convictions does not infringe on principle of separation of power or eliminate judicial discretion at sentencing stage since determination of maximum and minimum penalties is matter for legislature. West's F.S.A. § 775.082.

8. Constitutional Law ⇐52

When statutory sentence is not cruel and unusual on its face, it will be upheld against attack based on separation-of-powers grounds.

9. Criminal Law ⇐1206.1(1)

Aggravating and mitigating circumstances contained in sentencing statute are not impermissibly vague or overbroad but rather provide meaningful restraints and guidelines for discretion of judge and jury. West's F.S.A. § 921.141.

10. Criminal Law ⇐1206.1(1)

Mitigating factors contained in sentencing statute are not constitutionally deficient because limited by statute, since all relevant factors have been authorized to be presented in mitigation at sentencing phase of proceedings. West's F.S.A. § 921.141(6).

11. Criminal Law ⇐1206.1(2)

Death penalty statutes are not unconstitutional. West's F.S.A. §§ 775.082, 782.04(1)(a); U.S.C.A. Const.Amend. 14.

12. Criminal Law ⇐412.1(2), 641.12(1)

Defendant's cellmate was not acting as agent of State during time he shared cell with defendant at county jail, and thus statements made by defendant to cellmate were not obtained in violation of defendant's constitutionally guaranteed privilege against self-incrimination and his right to counsel, where there was nothing in record establishing that cellmate had any prearranged guarantee of money in return for information, and money he received from sheriff's department was drawn from general reward fund and was not given as inducement to elicit information; detective's advice to informant to keep his ears open did not constitute attempt by State to deliberately elicit incriminating statements. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amends. 5, 6.

13. Searches and Seizures ⇐7(12)

Taking into custody by police of property of arrested persons for safekeeping does not violate constitutional search and seizure protections. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures ⇐7(10)

After person allows his personal effects to be taken into custody by police and inventoried, any privacy interest previously attached thereto is dissipated.

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15. Searches and Seizures ⇐7(12)

Inventory of defendant's belongings, occurring incident to lawful arrest, did not constitute unreasonable search; subsequent inspection of belongings by police officer at jail caused no greater intrusion than original inventory, and since belongings had already been exposed to police view under lawful circumstances, inspection did not breach defendant's privacy interest in his belongings since any such right previously existing was relinquished by defendant when he originally acquiesced in inventory.

16. Arrest ⇐63.5(6)

While defendant was correct in his assertion that officers who stopped him had no probable cause or well-founded suspicion that he was about to commit or had committed any crime, showing of probable cause was not necessary where police officers were responding to call by citizen to investigate suspicious car and were not acting on their own hunch, and stop did not constitute unlawful intrusion.

17. Arrest ⇐63.5(7)

There exists distinction between intrusion by police amounting to "seizure" of person and encounter which intrudes upon no constitutionally protected interest.

18. Arrest ⇐63.5(8)

Where initial contact between defendant and police officer was justified, ultimate pat-down was also justified in that defendant's furtive movements and nervous appearance when observed by police officer formed reasonable ground to believe that defendant was armed and potentially dangerous; officer acted with prudence and was entitled to execute limited search for weapons.

19. Criminal Law ⇐412.2(5)

Inquiry made by defendant as to whether he had to continue his interview was not reassertion of his *Miranda* rights requiring second waiver of those rights where defendant knew of his right to end interrogation and did in fact end interrogation at later time by stating that he wished to say nothing further.

20. Criminal Law ⇐412.1(1)

Even if defendant, in asking whether he had to continue with interrogation, did reassert his right to remain silent, his voluntary resumption of answering interviewers' questions without any coercive measures being taken by interviewing officers to induce further testimony evidenced second knowing waiver.

21. Criminal Law ⇐412.2(5)

Express statement by accused that he fully understands and waives his *Miranda* rights is not necessary for valid waiver of those rights; waiver may be shown by attendant circumstances and by actions of accused; this is as true midinterview as it is at interview's inception.

22. Criminal Law ⇐627.8(6)

Motion to impose sanctions for state's failure to properly notify defendant of deposition to be taken of listed state witness is properly addressed to discretion of trial court. West's F.S.A. RCrP Rule 3.220(j).

23. Criminal Law ⇐627.8(6)

Trial court's decision not to impose sanctions, for failure to properly notify defendant of deposition to be taken of State's witness, greater than admonishment of both parties was not abuse of discretion especially where defendant's admitted motivation for filing motion for sanctions was to ensure that all future depositions would be properly noticed. West's F.S.A. RCrP Rule 3.220(j).

24. Criminal Law ⇐1208.1(6)

Sentencing procedure is not merely counting contest in which number of aggravating factors is compared to number of mitigating factors, with all factors having equal weight, but rather process involves reasoned judgment as to which factual circumstances weigh heavily toward or against imposition of death penalty.

25. Criminal Law ⇐1208.1(6)

Trial court's failure to find unenumerated mitigating factor of defendant's previous lack of violent history was not error where defendant's lack of past history of

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violence was not proved and strength of aggravating circumstances would have supported imposition of death penalty even had defendant's lack of past violent history been found as mitigating factor. West's F.S.A. § 921.141(6)(a, g).

26. Homicide ⇐354

Evidence which was sufficient to support findings of burglary and sexual battery was also sufficiently strong to support finding as aggravating circumstance that murder was committed while defendant was engaged in commission of sexual battery and to support finding of premeditated design. West's F.S.A. § 921.141(5)(d).

27. Homicide ⇐354

Evidence that defendant admitted knowing victim was sufficient to support finding as aggravating circumstance that murder was committed for purpose of avoiding or preventing lawful arrest. West's F.S.A. § 921.141(5)(e).

28. Homicide ⇐354

Evidence was sufficient to support finding as aggravating circumstance that murder was committed for pecuniary gain; consideration of murder for pecuniary gain and murder while engaged in burglary was not doubling of aggravated circumstances. West's F.S.A. § 921.141(5)(f).

29. Homicide ⇐354

Evidence was sufficient to support finding as aggravating circumstance that murder was especially heinous, atrocious, or cruel where murder and events leading up to its consummation were unnecessarily torturous of victim. West's F.S.A. § 921.141(5)(h).

30. Homicide ⇐354

Evidence was sufficient to support finding as aggravating circumstance that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification where defendant cut phone lines, entered house at time when others would most likely not be present, and effected execution-style killing using pillow placed between murder weapon and victim's head. West's F.S.A. § 921.141(5)(i).

31. Homicide ⇐354

Trial court in first-degree murder prosecution did not err in imposing death sentence in accordance with advisory recommendation of jury.

Jerry T. Lockett, Sp. Asst. Public Defender, Tavares, for appellant.

Jim Smith, Atty. Gen., and Sean Daly, Asst. Atty. Gen., Daytona Beach, for appellee.

ADKINS, Justice.

We have for review a judgment of conviction and a sentence of death imposed by a trial court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant, Ian Lightbourne, was convicted of first-degree murder and as recommended by the jury, was sentenced to death. By appeal he seeks a reversal of his conviction and his sentence. For the reasons set out below we affirm both appellant's conviction and the sentence of death imposed upon him. The facts are complex and will be recited together with their respective issues which appellant raises on appeal.

I.

The indictment reads in part:

[T]hat IAN LIGHTBOURNE of the County of Marion and State of Florida, on the 16th or 17th day of January, 1981, in the County and State aforesaid, did unlawfully, from a premeditated design to effect the death of a human being and/or while engaged in the perpetration of a burglary and/or involuntary sexual battery, kill and murder Nancy A. O'Farrell, a human being, by shooting her with a firearm, to-wit: a .25 caliber automatic pistol, a more particular description being to this Body unknown, in violation of Florida Statute 782.04.

[1] Appellant's (hereinafter defendant) initial claim is that the indictment does not

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allege the time of the offense "as definitely as possible" under Florida Rule of Criminal Procedure 3.140(d)(3). However, it is not necessary that an indictment or information state the exact date of the offense if such date is not known. Rather the indictment or information in such cases will be deemed sufficient if it is alleged that the offense occurred within stated specific time limits. *Sparks v. State*, 273 So.2d 74 (Fla.1973); *State v. Bandi*, 333 So.2d 75 (Fla. 4th DCA 1976), *cert. denied*, 344 So.2d 323 (Fla.1977).

The statement of particulars given by the state narrowed the time period for the alleged offense to sometime between 5:30 p.m. on January 16, 1981, and 4:00 p.m. on January 17, 1981. Furthermore, this time frame was based on scientific evidence obtained at the crime scene and during the subsequent autopsy and later presented at trial. Scientific experts could only narrow the time of death to approximately midnight of January 16, 1981.

[2] Given the limited information possessed by the state relative to the time of death of the decedent, the indictment sufficiently charged the time of the offense and notified the defendant of the time of the murder as specifically as possible. As such, the trial court did not err in denying the defendant's motion to dismiss the indictment on this ground. Fla.R.Crim.P. 3.140(d)(3).

The defendant also challenges the indictment on grounds of overbreadth and vagueness, arguing that the state, by charging in the disjunctive in this case, has effected the result of charging two inconsistent offenses, that is felony murder and premeditated murder.

[3] An indictment or information will be dismissed for vagueness only if it is so vague, indistinct and indefinite so as to mislead a defendant or embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. *State v. Dilworth*, 397 So.2d 292 (Fla.1981); *State v. Black*, 385 So.2d 1372 (Fla.1980); Fla.R.Crim.P. 3.140(o).

Under section 782.04, Florida Statutes (1981), the offense of first-degree murder may be committed in several ways, including murder by premeditated design or a felony murder supported by various felonies, among which are included the felonies of burglary and sexual battery. The instant indictment tracked the statute and adequately placed the defendant on notice that he was charged with first-degree murder resulting from any one or a combination of the three specific methods in the indictment. The single offense of first-degree murder may be proven by alternate methods, so it follows that the charging instrument should be free to include such alternate bases for conviction.

[4] The allegations of the indictment are sufficient to charge murder in the first degree, regardless of whether the murder was committed with premeditated design or in the perpetration of the enumerated felonies. *Knight v. State*, 338 So.2d 201 (Fla. 1976); *Barton v. State*, 193 So.2d 618 (Fla. 2d DCA 1966), *cert. denied*, 201 So.2d 459 (Fla.1967). Consequently, the indictment was not vague or overbroad since it specifically apprised the defendant of the criminal acts allegedly committed which support the charge of first-degree murder.

[5] The defendant's final challenge under Point I is that the indictment could be construed as charging only felony murder and that charging only felony murder and proving premeditated murder is impermissible under *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977). The indictment herein clearly incorporates an allegation that the murder was premeditated in design. The *Ables* decision involved a case in which premeditated murder was never alleged, and as such that case is clearly distinguishable from the instant case.

II.

The defendant claims that the trial court erred in denying his second motion to dismiss the indictment, arguing that the aggravating circumstances to be applied at

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the sentencing stage in capital felony cases must be originally alleged in the indictment in order to confer jurisdiction on a court to impose a sentence of death. If such allegations are not made, argues the defendant, death is not a permissible penalty, for it is now established that the sentencing process, as well as the trial itself, must satisfy the requirements of due process. *See, Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

[6] The defendant's arguments raised under Point II are clearly without merit, having been previously addressed and rejected in *Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The trial court did not err in denying the defendant's motion to dismiss the indictment or to declare that death was not a possible penalty.

III.

The defendant raises a number of constitutional challenges to sections 775.082(1), 782.04(1), and 921.141, Florida Statutes, (1981). Such challenges for the most part have been previously considered and disposed of by this and other courts.

[7, 8] First, the defendant claims that section 775.082, by fixing the penalties for capital felony convictions, infringes on the principle of separation of power, eliminates judicial discretion at the sentencing stage, and is therefore unconstitutional. This argument is clearly misplaced. The constitutionality of this section has been repeatedly upheld. *Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Additionally, the determination of maximum and minimum penalties is a matter for the legislature. Also, when a statutory sentence is not cruel and unusual on its face it will be upheld against an attack based on separation of powers grounds. *Sowell v. State*, 342 So.2d 969 (Fla.1977).

[9] Second, the defendant attacks the constitutionality of section 921.141, arguing that the aggravating and mitigating circumstances contained in the statute are impermissibly vague and overbroad. This Court has ruled on numerous occasions upholding the constitutionality of the section, finding that the statutorily prescribed circumstances were not vague but rather provided "[m]eaningful restraints and guidelines for the discretion of judge and jury." *State v. Dixon*, 283 So.2d at 9. Subsequent decisions buttress the constitutionality of the statute. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); *Alvord v. State*.

[10] The defendant's claim that the mitigating factors contained in section 921.141(6) are constitutionally deficient because limited by statute is without merit. In *Sireci v. State* and *Songer v. State*, 419 So.2d 1044 (Fla.1982), all relevant factors were authorized to be presented in mitigation at the sentencing phase of the proceedings.

[11] Finally, the defendant asks this Court to reverse its position on the constitutionality of Florida's death penalty statutes, sections 782.04(1)(a) and 775.082. This we decline to do. These statutes have been repeatedly upheld against claims of denial of due process and equal protection, as well as against assertions that they constitute cruel and unusual punishment. *Proffitt v. Florida; Spinkellink v. Wainwright; Ferguson v. State*, 417 So.2d 639 (Fla.1982); *Songer v. State, Booker v. State*, 397 So.2d 910 (Fla.), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981); *Antone v. State; Foster v. State; Martin v. State*, 377 So.2d 706 (Fla.1979); *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); *Alford v. State*, 307 So.2d 433 (Fla.1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49

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L.Ed.2d 1221, *Alvord v. State*; *Swan v. State*, 322 So.2d 485 (Fla.1975); *State v. Dixon*. The defendant has failed to establish or demonstrate that this Court's position on the death penalty statutes should be disturbed.

Accordingly, we hold that the trial court did not err in denying the defendant's motion to declare sections 775.082(1), 921.141 and 782.04(1) unconstitutional.

IV.

Defendant's basic claim under Point IV is that Theodore Chavers, a state witness at trial, was acting as an agent of the state during the time he shared a cell with the defendant at the Marion County jail. Consequently defendant argues that any statements made by him to Chavers should have been suppressed in that the defendant was unaware that he was talking to a government agent, and such statements were obtained in violation of his constitutionally guaranteed privilege against self incrimination and his right to counsel. U.S. Const. amend. V and VI; Art. 1, § 12, Fla. Const.

The threshold inquiry here is whether or not Theodore Chavers was acting as an agent of the state. In *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Supreme Court held that sixth amendment rights were violated when:

> [T]here was used against [the defendant] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Id. at 206, 84 S.Ct. at 1203.

In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court applied *Massiah* in the context of using informant information and apparently recognized an active/passive dichotomy in determining whether or not an informant is to be deemed acting as an agent of the state in any particular case. The key to the *Henry* decision lies in the requirement that in order for an informant to be acting as a state agent he must, acting in concert with the state, actively stimulate or instigate conversation specifically designed to elicit incriminating information. If no active role is taken by the informant, but rather he merely remains passive and keeps his ears open for anything the defendant might wish to volunteer, then under the *Henry* analysis there is no agency relationship which would trigger the fifth and sixth amendment protections.

[12] In *Henry* the Court found that the informant, Nichols, was acting under instructions as a paid informant for the government. In return for information he was given money and this arrangement was mutually understood. In the instant case there is nothing in the record establishing that the informant Chavers had any prearranged guarantee of money in return for information, and it appears that the two hundred dollars that he did receive from the Marion County Sheriff's Department was drawn from a general reward fund and not given as an inducement to elicit information.

Similarly, Investigator LaTorre's advice to the informant Chavers to keep his ears open does not constitute an attempt by the state to deliberately elicit incriminating statements. Without some promise or guarantee of compensation, some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the state's actions in this case to an agency relationship with the informant Chavers.

The informant Chavers' testimony regarding statements made by the defendant was properly allowed into evidence and the trial court did not err in denying defendant's motion to suppress.

V.

The defendant claims that certain personal items taken from him at the time of his arrest on the weapons charge should have been held inadmissible in his trial on the murder charge. This argument is without merit.

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[13] The taking into custody, by police, of property of arrested persons for safekeeping does not violate constitutional search and seizure protections. *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974); *United States v. Lipscomb*, 435 F.2d 795 (5th Cir.1970), *cert. denied*, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971); *Delatte v. State*, 384 So.2d 245 (Fla. 1st DCA 1980).

[14, 15] Furthermore, after a person allows his personal effects to be taken into custody by police and inventoried, any privacy interest previously attached thereto is dissipated. *United States v. Grill*, 484 F.2d 990 (5th Cir.1973), *cert. denied*, 416 U.S. 989, 94 S.Ct. 2396, 40 L.Ed.2d 767 (1974). The inventory of the defendant's belongings, occurring incident to a lawful arrest did not constitute an unreasonable search; subsequent inspection of the belongings by Officer LaTorre at the jail caused no greater intrusion than the original inventory. Since the belongings had already been exposed to police view under lawful circumstances, Officer LaTorre's inspection did not breach defendant's privacy interest in such belongings since any such right previously existing was relinquished by the defendant when he initially acquiesced to having his property inventoried. *Id.*

The trial court made no error in its denial of defendant's motion to suppress dated April 13, 1981.

VI.

The defendant argues that his detention by Officer McGowan prior to his arrest on the concealed weapons charge constituted an illegal stop under the rationale of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). As a result, defendant argues, all items seized as a result of the "illegal" stop should be suppressed from evidence as "fruits of the poisonous tree" from which they issued. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We disagree.

[16] We find, under the circumstances of this case, that no unlawful intrusion occurred when Officer McGowan approached Mr. Lightbourne for the purpose of investigating a suspicious car called to his attention by a concerned citizen of the community. Although defendant is correct in his assertion that the officers had no probable cause or well-founded suspicion that the defendant was about to commit or had committed any crime, under the instant facts such a showing was not necessary. The officers were responding to a call and were not acting on their own "hunch" as in the "roving patrol" cases.

In *Terry*, the Supreme Court noted that, "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the street." 392 U.S. at 34, 88 S.Ct. at 1886 (White, J., concurring). This is so even under normal conditions with officers having no concrete suspicion on which to rely. Of course in such situations a person would be under no duty to remain, and could continue on his way if he chose to do so. That person, instructed the *Terry* Court, "*absent special circumstances* may not be detained or frisked but may refuse to cooperate and go on his way." *Id.* (Emphasis added.)

[17] There exists, therefore, a distinction between an intrusion by police amounting to a "seizure" of the person and an encounter which intrudes upon no constitutionally protected interest. *Terry v. Ohio; United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States v. Elmore*, 595 F.2d 1036 (5th Cir.1979), *cert. denied*, 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980).

Officer McGowan's investigation of the suspicious vehicle in this case does not rise to the level of an unconstitutional stop or seizure. Officer McGowan simply approached the parked car, asked defendant a few simple questions as to the reason for his presence there, his current address, and then ran a routine check on defendant's car and identification. Surely the average, rea-

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sonable person, under similar circumstances, would not find the officer's actions unduly harsh. There is nothing in the record that would indicate that prior to defendant voluntarily relinquishing his driver's license to Officer McGowan he was not free to express an alternative wish to go on his way. The Court need not consider here the question of what would happen if a citizen, asked for identification under somewhat similar conditions, and who upon declining to surrender such identification, was placed under arrest. The implication is that in reality, rather than theory, one who has been so confronted by an officer is not free to leave.

The Supreme Court has repeatedly acknowledged the need for police questioning as a tool for effective enforcement of our criminal laws. *United States v. Mendenhall.* Florida courts have recognized that, in this context, law enforcement officers can indeed initiate contacts with citizens without creating a stop and seizure situation.

In *State v. Rawlings*, 391 So.2d 269 (Fla. 4th DCA), *petition denied*, 399 So.2d 1145 (Fla.1981), an individual heard some shots outside his home and, upon investigating saw someone outside, but could not identify him. He called the police who arrived on the scene to find the defendant and a woman on the street in the vicinity. The officer engaged the defendant in conversation and while doing so, noticed the outline of a gun in his back pocket. The officer then conducted a pat-down search which revealed a .25 caliber pistol. The court in *Rawlings* held that the police in that case did not have a founded suspicion to justify a detention of the defendant. However, while the court agreed that there was insufficient evidence of an articulable basis of founded suspicion presented at the hearing on the motion to suppress, it nevertheless found that the police activity in this case did not constitute a detention of the defendant. Thus no showing of founded suspicion was required to justify the encounter. The court went on to add:

> A mere contact between a citizen and a police officer which evokes *voluntary* cooperation on the part of the citizen is not a "seizure" within the meaning of the Fourth Amendment. If, during a lawful and extremely temporary encounter between a police officer and a citizen, probable cause is formulated to believe that the citizen is carrying a dangerous weapon, a frisk of that citizen's person is entirely justified to insure the safety of the police officer.

Id. at 270.

In *Carter v. State*, 370 So.2d 1181 (Fla. 4th DCA), *cert. denied*, 378 So.2d 343 (Fla. 1979), the court, citing *Mullins v. State*, 366 So.2d 1162 (Fla.1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979), recognized that there would be instances where legitimate contact between police officers and citizens, not based upon founded suspicion of criminal activity or probable cause, might result in the subsequent arrest of the citizen for a crime detected by the officer as a result of the legitimate contact.

In the case sub judice we find that no "stop" or "seizure" of the defendant within the meaning of *Terry* and its progeny occurred prior to his removal from the car by Officer McGowan to conduct the pat-down search. Officer McGowan was simply performing his duty as a police officer to investigate a citizen complaint, motivated by a concern that the defendant might be in need of assistance. Once on the scene, the officer acted prudently for the protection of the safety of the concerned citizen and his neighbors in the community when he proceeded to check out the defendant's car and identification.

[18] Given the fact that the initial contact was justified, the ultimate pat-down was also justified in that defendant's furtive movements and nervous appearance when observed by Officer McGowan formulated a reasonable ground to believe that the defendant was armed and potentially dangerous. *United States v. Tharpe*, 526 F.2d 326 (5th Cir.1976); *Jackson v. State*, 403 So.2d 1116 (Fla. 5th DCA 1981). The officer in this case acted with prudence and

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was entitled to execute the limited search for weapons which might be used to assault him. *Terry v. Ohio*.

Based on the foregoing, we hold the officer's initial contact with the defendant to have been legitimately initiated for the purpose of investigating the citizen's call regarding a suspicious vehicle. We further hold that such contact as is evidenced by these facts did not constitute a stop or seizure of the defendant under *Terry* principles. Finally, the objectively discernible actions of the defendant provided Officer McGowan with a reasonable ground for searching the defendant for dangerous weapons. As such, we therefore hold that the gun and subsequent items found as a result of the search of the defendant's car incident to his lawful arrest on the weapon's charge, were correctly admitted into evidence by the trial court, and the court did not err in denying defendant's motion to suppress said items.

VII.

Defendant argues that certain videotaped statements made of him while he was being interrogated by police officers should have been held inadmissible under the rationale of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We disagree.

The record reflects that defendant was twice advised of his *Miranda* rights; at the Marion County jail when picked up, and prior to his interrogation at the Sheriff's Department Operations Center on February 3, 1981. When asked if he understood his rights, the defendant stated that he did, and that he had no reason not to talk to the interrogators. The interview was promptly terminated when defendant finally expressed his wish to state nothing further.

Defendant argues that sometime prior to the termination of the interview, he sought to conclude the questioning by asking whether he had to continue. This inquiry, argues the defendant, evidenced a reassertion of his right to cut off the interrogation, and therefore any statements subsequently made by defendant should have been inadmissible due to a lack of a *second* waiver of his *Miranda* rights.

[19, 20] The thrust of defendant's argument goes to whether or not the defendant did indeed reassert his right to remain silent when he inquired whether or not he must continue the interview. Under the facts of this case we cannot say that defendant wished to conclude the interview at the time he made his inquiry, and even if he did so intend, his subsequent actions evidenced a second knowing waiver after such attempt.

[21] An express statement by an accused that he fully understands and waives his *Miranda* rights is not necessary for a valid waiver of those rights. This is as true mid-interview as it is at its inception. Waiver may be shown by attendant circumstances and by actions of the accused. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *United States v. Hayes*, 385 F.2d 375 (4th Cir.1967), *cert. denied*, 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106 (1968); *State v. Craig*, 237 So.2d 737 (Fla.1970).

The fact that defendant knew of his right to end the interrogation is made manifest by his finally stating that he wished to say nothing further and ending his conversation at that point. We find that the mid-interview inquiry made by defendant did not rise to the level of a reassertion of his *Miranda* rights requiring a second waiver of those rights. However, even if such inquiry were to be held tantamount to a reassertion, we find that by his actions defendant once again waived his rights.

After the defendant questioned his need to go on, he voluntarily resumed his responses to the interviewers. There has been no showing made of any coercive measures taken by the interviewing officers to induce further testimony from defendant. Indeed, quite the opposite is reflected by the record. It is therefore apparent in this case that defendant's conduct evidenced a voluntary waiver of his known constitutional rights throughout the interrogation process.

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We find that the trial court properly considered the videotape and surrounding testimony in this case and clearly determined that the statements were freely and voluntarily made in light of *Miranda*. Consequently, the trial court did not err in admitting into evidence, over defendant's motion to suppress, the statements made by defendant during his custodial interrogation on February 3, 1981.

VIII.

The defendant argues that the trial court erred in denying defendant's motion to impose sanctions under Florida Rule of Criminal Procedure 3.220(j), for the state's failure to properly notify defendant of a deposition to be taken of a listed state witness. See Fla.R.Crim.P. 3.220(d).

As the record reflects, defendant's admitted motivation for filing the motion in the first place was to insure that all future depositions would be properly noticed, thus assuring defendant's opportunity to be present at those depositions. The trial court, after a hearing on the motion, ordered that all future depositions be properly noticed, thereby satisfying defendant's concern.

[22, 23] Finding that a motion under Rule 3.220(j) is properly addressed to the discretion of the trial court, and finding no abuse of discretion in this case, we hold there was no error in the court's decision not to impose sanctions greater than admonishment of both parties, as was done in this case.

IX.

The defendant claims that the death sentence imposed upon him in this case is not justified, arguing that it was based upon inappropriate aggravating circumstances, that the court failed to consider an unenumerated mitigating circumstance, and that the mitigating circumstances outweigh the aggravating circumstances.

[24] In the instant case, following presentation of evidence at the penalty phase, the jury returned an advisory recommendation of death. In imposing the death penalty in this case the trial court found five aggravating and two mitigating factors. Of course the sentencing procedure is not merely a counting contest in which the number of aggravating factors is compared to the number of mitigating factors, with all factors having equal weight. *State v. Dixon*, 283 So.2d 1 (Fla.1973). Rather the process involves a reasoned judgment as to what factual circumstances weigh heavily toward or against the imposition of the ultimate penalty.

We will first consider the mitigating factors due to their relatively straightforward import. The trial judge found that the defendant was twenty-one years old at the time of the crime and had no significant history of prior criminal activity. § 921.141(6)(a) and (g), Fla.Stat. (1981). Contrary to defendant's assertions, we find that the defendant's lack of past history of violence was not overlooked in consideration of sentence, but rather was not proved by the defendant. The trial court properly considered all matters.

[25] We find no error in the court's failure to find the unenumerated mitigating factor of defendant's previous lack of violent history. Moreover, as will be shown hereafter, the strength of the aggravating circumstances in this case would have supported the imposition of the death penalty even had defendant's lack of past violent history been found as a mitigating factor.

Next we review the aggravating circumstances found to exist in this case.

Aggravating Circumstances

[26] 1. *The capital felony was committed while the defendant was engaged in the commission of a burglary and sexual battery.* § 921.141(5)(d), Fla.Stat. (1981). The evidence presented to the jury in this case, and considered by the learned trial judge at sentencing was clearly sufficient to establish the burglary and sexual battery. A screen had been cut and a window of victim's house had been pried open and broken. Testimony revealed that the defendant had

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admitted surprising the victim in her home, that he took some money, a necklace, and a small silver coin bank. The phone cords had been severed. Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death. The defendant's blood type was consistent with semen and blood tests and factors present therein as testified to by experts. Pubic hair found at the crime scene was microscopically matched with those of the defendant. These facts and others contained in the record in this case are clearly sufficient to support the findings of burglary and sexual battery. As such they also stand sufficiently strong to support the aggravating circumstance under section 921.141(5)(d).

The evidence was sufficient to show premeditated design. During the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill her. Despite her pleas that he not kill her, defendant fired a shot striking her on the left side of the head. The weapon was held against a pillow at the time it was fired. The examining doctor said she bled to death. Defendant's argument with respect to the unconstitutional effect of "automatic" aggravating circumstances solely in the felony murder context is inappropriate in this case.

[27] 2. *The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.* § 921.141(5)(e), Fla. Stat. (1981). Once again the evidence presented at trial strongly supports this aggravating circumstance. Defendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest. Proof of the requisite intent to avoid detection is strong in this case. *See Riley v. State*, 366 So.2d 19 (Fla.1978).

[28] 3. *The capital felony was committed for pecuniary gain.* § 921.141(5)(f), Fla.Stat. (1981). Defendant says that the consideration of murder for pecuniary gain and murder while engaged in a burglary is a doubling of aggravating circumstances. We have held in applying the aggravating circumstances that the trial court does not improperly duplicate robbery and pecuniary gain where defendant committed the crime of rape in conjunction with the murder. *Brown v. State*, 381 So.2d 690 (Fla.1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). There was adequate proof of rape.

[29] 4. *The capital felony was especially heinous, atrocious, or cruel.* § 921.141(5)(h), Fla.Stat. (1981). Taking into consideration the totality of circumstances in this case, the murder and the events leading up to its consummation were carried out in an unnecessarily torturous way toward the victim. The record reflects that the victim was forced to submit to sexual relations with defendant prior to her death, while pleading for her life, and we cannot say that the trial court's finding of heinousness is at material variance with the facts.

[30] 5. *The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.* § 921.141(5)(i), Fla.Stat. (1981). We find that the defendant cut phone lines, entered the house at a time when others would most likely not be present, and effected the execution-style killing using a pillow placed between the murder weapon and the victim's head. As such, the trial court could properly find this aggravating circumstance.

[31] For the foregoing reasons it is held that the trial court did not err in imposing the death sentence upon the defendant in accordance with the advisory recommendation of the jury.

In the performance of our constitutional duty we have reviewed the entire record below and have considered all issues presented on appeal. Therefore we now hold that the defendant's judgment of conviction and sentence of death are hereby affirmed.

It is so ordered.

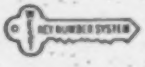
ALDERMAN, C.J., and BOYD and EHRLICH, JJ., concur.

McDONALD, J., concurs in the conviction, but dissents from the sentence.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I reluctantly dissent because I find the recent United States Supreme Court decision in *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), mandates a reversal under the circumstances of this case. A jailhouse informer was placed in a cell adjacent to the appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services. These factors make the informant an agent of the state under the dictates of *Henry*, which requires suppression of the statements made by the appellant to the informant in the absence of *Miranda* warnings. I find we have no choice but to grant a new trial.



BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, Petitioner,

v.

Thomas G. GRICE and Lilla Grice, Personal Representatives of the Estate of Debbie Diane Grice, Respondents.

No. 62174.

Supreme Court of Florida.

Sept. 22, 1983.

Upon petition for review of a decision of the District Court of Appeal, 413 So.2d 88, which reversed a dismissal of a complaint against county for improper venue, the Supreme Court, Boyd, J., held that trial court has discretion to dispense with home venue privilege or government entities when a governmental body is sued as a joint tort-feasor and exercise of such discretion must be guided by considerations of justice, fairness, and convenience under the circumstances of the case; in its discretion, trial court may retain entire case, sever and transfer the cause of action against the entity asserting the privilege if it is severable, or transfer the entire case but the privilege, although not absolute, should be given substantial consideration in such process along with the other considerations presented and the interests of other parties.

Decision approved in part and quashed in part; cause remanded with directions.

Ehrlich, J., filed specially concurring opinion in which Adkins and Overton, JJ., joined.

1. Appeal and Error ⇐78(4)

Although an order concerning venue is ordinarily considered interlocutory, it may result in a final order dismissing the complaint.

2. Appeal and Error ⇐78(4)

An order and a motion to dismiss may not be final but an order which actually dismisses the complaint is final for purposes of an appeal.

3. Appeal and Error ⇐78(4), 428(2)

Where original order ruling that venue was improper actually dismissed the complaint against hospital and county, it was a final order subject to a motion for rehearing and the filing of motion for rehearing therefore tolled time for filing the appeal and since notice of appeal was filed within 30 days of trial court's denial of motion for rehearing, District Court of Appeal had jurisdiction over the appeal. West's F.S.A. R.App.P.Rules 9.020(g), 9.130.

4. Venue ⇐22(9)

Trial court has discretion to dispense with home venue privilege for government entities when a governmental body is sued as a joint tort-feasor and exercise of such discretion must be guided by considerations of justice, fairness, and convenience under the circumstances of the case; in its discretion, trial court may retain entire case, sever and transfer the cause of action against

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Appendix 14-33

Excerpted portions of Petitioner's
initial brief on appeal in the
Florida Supreme Court

be an accidental homicide and also lawful, but punished as premeditated murder.

The Statute in question, Chapter 782.04(1)(a), Florida Statutes (1980), on its face and as applied, is inconsistent with the U. S. Constitution, Article I, Sections 9 and 3, and Amendments 5, 8 and 14, and the Florida Constitution, Article I, Sections 2, 9 and 17.

Defendant argues that he has a liberty interest which is adversely effected by this statutory scheme in that he was charged with felony murder, and this statutory scheme violated the Defendant's right to due process by denying him the right to have the jury consider if a culpable mental state existed. Since the penalty was death, the Defendant was denied equal protection of the law in that other homicides without the culpable mental state would not be so punished. The presupposition that a homicide in perpetration of a felony is "unlawful" is a legislative act not subject to judicial determination and thus may constitute a bill of attainder. The possible penalty of death would therefore constitute cruel and unusual punishment in that it is grossly disproportionate to the severity of the crime. Thus, Florida Statute 782.04(1)(a) is unconstitutional. See Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948).

The lower court erred in failing to dismiss the Indictment filed against the Defendant because the statute under which he was charged was unconstitutional.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE AND DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

The facts upon which Defendant's Motion in Limine were based are as follows:

The accused was originally incarcerated at the Marion County Jail on January 24, 1981, for the offense of Carrying a Concealed Firearm. This

incarceration continued as of February 3, 1981, at which time he was arrested for the instant offense (R801).

At all times subsequent to January 24, 1981, the Defendant was incarcerated at the Marion County Jail.

During said incarceration the accused was placed in a cell with inmates Theophilus Carson and Theodore Chavers (R1106, 1175). The State presented Carson and Chavers as witnesses in the trial hereof and they testified as to conversations they had with the accused. (R1106 et. seq; 1175 et. seq.) The reputation of these two witnesses for truth and veracity in the community was at best debatable. Carson had been previously convicted of a criminal offense (R1184), and Chavers had been so convicted three (3) times (R1163), although initially he only admitted two (2) convictions (R1153).

Additionally, the witnesses were rewarded for their testimony. Chavers received monetary remuneration from the Sheriff's Department (R1026) and both had their periods of incarceration reduced at the insistence of law enforcement and the State Attorney's Office (R1119, 1195).

The witness Chavers had previously served a jail sentence for Contempt of Court for failure to testify at a criminal trial (R1163).

A pretrial determination as to the legal competency of these witnesses to testify was essential to a fair determination of this cause. However,none was held. In fact, the admissibility of their testimony without such a pretrial determination of their competency caused irreparable prejudice to the accused which was not rendered harmless by any curative instructions by the Court.

Thus, based on the facts, pleadings in the record, and the law of the State of Florida as set forth in Florida Statute 90.603 both witnesses should have been disqualified from testifying.

In addition, statements of the Defendant allegedly given to Theodore

Cleveland Chavers, as related by Investigator LaTorre, including recordings of Chavers given to Investigator LaTorre, should have been suppressed pursuant to Florida Rule of Criminal Procedure 3.190(i) for the following reasons:

Defendant was arrested on January 24, 1981 on the charge of Carrying a Concealed Firearm, Criminal Case No. 81-127-CF-A-01 (R801).

Counsel was appointed for that charge on that day. Counsel was the Public Defender's Office, Fifth Judicial Circuit.

On Sunday evening, February 1, 1981, Theodore Chavers, an inmate at the Marion County Jail, called Fred LaTorre, Marion County Sheriff's Department Investigator, and reported that a cellmate, Ian Lightbourne, was upset because the cops believed a gun like his, or like the one taken from him, was involved in the murder which is the subject of the above-styled cause (R1108, 1112, 1118).

Theodore Chavers was known to Investigator LaTorre as having aided the authorities, including LaTorre, in other cases. Investigator LaTorre told Chavers to gain further information from the Defendant (R1594).

Based on Chavers information, the gun seized from the Defendant in Case No. 81-127-CF-A-01 was sent to the crime lab for a ballistics comparison with a projectile removed from the body of Nancy A. O'Farrell (R1248-1249). After a match by a ballistics expert, the Defendant was arrested on February 3, 1981, for the offense of First Degree Murder in the above-styled cause.

Theodore Chavers received $200.00 from the Sheriff's Department (R1026) and he was released on his own recognizance on February 10, 1981, on three (3) felony charges while the misdemeanor sentence he was serving was mitigated (R1119). He also gave two taped statements concerning his purported conversations with the Defendant to Investigator LaTorre on February 3 and 12, 1981.

Theodore Chavers, the informer, was being paid by the State and was therefore under the same constraints as any State agent. Any statements or

admissions made by the Defendant to Chavers were made in the absence of his counsel to a person who elicited such statements in anticipation of a reward for his disclosures. This was in clear violation of Malone v. State, 390 So.2d 338 (Fla. 1980), Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and United States v. Henry, 100 S.Ct. 2183, 65 L.Ed.2d. 115 (1980).

Thus, any statements made by the Defendant to Chavers should have been suppressed, in that he was unaware he was talking to a government agent, and such statements were obtained in violation of his privilege against self-incrimination and his right to counsel guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States and Article I, Section 12 of the Florida Constitution.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS FILED ON OR ABOUT APRIL 13, 1981.

The Defendant, pursuant to Florida Rule of Criminal Procedure 3.190(h), moved to suppress from use in evidence the following evidence:

A. Medium-heavy gold chain.

B. Small gold chain with a gold rose or flower which bears the Greek letters A.O.T. on the back of the rose or flower as a cameo madonna.

C. A pair of ultra light leather gloves.

The grounds on which this motion were based are as follows:

The property was first discovered by law enforcement officers in the personal property of the accused at the Marion County Jail in the absence of a search warrant and the accused was in custody at the Marion County Jail at the time these items were initially observed (R1633). The property was initially searched for at least one week subsequent to the accused being booked into the

Marion County Jail (R1631).

The accused at no time consented to a search of his personal belongings at the Marion County Jail.

Subsequent to the original search of the accused's personal property at the Jail, Assistant State Attorney Albert C. Simmons executed an Affidavit for a Search Warrant to the above-described property (R1631). Based on the Affidavit of Assistant State Attorney Simmons, the Honorable Wallace Sturgis, Circuit Judge, issued a Search Warrant for the personal property of the accused (R1633).

The allegations of the Affidavit and Search Warrant as to what property was sought to be seized were illegally obtained prior to issuance of both the Affidavit and Search Warrant and the subsequent issuance of the Affidavit and Warrant herein cannot cure the illegality of the prior search.

The allegations of the Affidavit are necessarily hearsay in nature and do not establish probable cause for the Warrant herein as the affiant did not have personal knowledge of those matters alleged in the Affidavit (R1634).

Thus, pursuant to Article I, Section 12 and Section 23 of the Florida Constitution and the Fourth and Fourteenth Amendments to the United States Constitution, these items should have been suppressed as well as any other reference to said items.

POINT VI

THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS ALL OF THE ITEMS LISTED IN DEFENDANT'S SAID MOTION DATED MARCH 31, 1981.

As grounds for this argument, Defendant would show as follows:

Ocala Police Officers McGowan and Becker responded to a dispatched report of a suspicious vehicle at S.W. 23rd Avenue at S.W. 1st Street, Ocala, Florida and arrived at that location at approximately 8:00 a.m. on January 24, 1981 (R795, 817, 811). Sgt. Becker responded to the scene in his capacity as

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Patrol Supervisor (R816, 823) and arrived a few minutes after Officer McGowan (R817).

The caller who initially reported the "suspicious" vehicle to the police department did not describe the vehicle in question as to make, model, color, year or tag number (R1540).

The Officers responding to the area did not know the make, model, color, year or tag number of the vehicle which was subject of the dispatch (R812, 813).

The caller who initially reported the "suspicious" vehicle to the police department did not describe the occupant or occupants of the vehicle as to sex, age, color, height, weight, clothing, location within the vehicle or as to activity of such person other than suggesting the person might be "asleep or dead". (R1540).

The Officers responding to the area did not know the sex, age, color, height, weight, clothing, location within the vehicle or previous activities of the occupant or occupants of the vehicle which was subject to the dispatch (R812, 813) and were not informed as to the identity of the caller who originally reported the "suspicious" vehicle.

The vehicle and subject contacted by the officers were located in a predominantly black residential neighborhood (R248) and the occupant of the vehicle in question was black.

The dispatch to the responding officers included no facts which would give rise to a well founded suspicion that a crime had been, was being, or was about to be committed (R1551, 1559).

The observation of the vehicle and its occupant did not create in the minds of either officer that a crime had been, was being, or was about to be committed (R1559). Upon request the vehicle's occupant produced proper identification and a reasonable explanation as to his presence at that location at that time (R262, 809).

It was determined at the scene, through radio communication to the Officers that the accused was not wanted by any law enforcement agency (R808) and that the accused's vehicle was not stolen (R809).

The accused presented the Officers at the scene with a current driver's license and a current registration for his vehicle (R809) and after the accused had provided identification for himself and his vehicle and explained his presence to the Officer, the Officers ordered the accused to get out of his vehicle (R800). At the time the accused was ordered from the vehicle, neither Officer had a founded suspicion he had committed, was committing, or was about to commit a crime.

At no time subsequent to the initial contract or prior to the pat-down search was the accused free to leave the area (R1561).

After the accused obeyed the order of the Officer and removed himself from the vehicle, Officer McGowan conducted a pat-down search which disclosed an object in the accused's pocket, which after removed by Officer McGowan, was identified as a .25 caliber automatic pistol (R801).

The detention and pat-down search of the accused at all times pertinent hereto was accomplished without benefit of a warrant to either arrest or search the accused (R1558, 1559).

Thus, the detention and pat-down search violated the legislative pronouncement in this area, to-wit: Florida Statute 901.151 as to both the letter and spirit of such law, and violated Section 12 and 23 of Article I of the Florida Constitution and the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, as will be more fully discussed herein.

All the evidence set forth above was discovered and seized as a direct result of the initial detention which combined to produce the poison tree that the United States Supreme Court warned of in Wong Sun v. U.S., 371 U.S. 471,

83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

All the evidence listed in the motion was seized as a direct result of the unlawful detention and frisk herein and as such should have been suppressed from use in evidence.

But for the illegal detention, there would have been no frisk.

But for the illegal frisk, the .25 caliber automatic revolver would not have been recovered.

But for the illegal seizure of the .25 caliber automatic relover there would be no lab tests suggesting that this was the gun used to kill Nancy A. O'Farrell.

But for the lab results indicating this particular weapon was used to kill Nancy A. O'Farrell, no search warrant would have been issued for the accused's vehicle.

But for the issuance of a search warrant for the accused's vehicle, evidence therefrom could not have been legally seized.

But for the lab results indicating this particular weapon was used to kill Nancy A. O'Farrell, no search warrant would have been issued for the personal property of the accused held at the Marion County Jail.

But for the issuance of a search warrant for the personal property of the accused held at the Marion County Jail, evidence therefrom could not have been legally seized.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been arrested for any criminal violation.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been arrested for Carrying a Concealed Firearm, or charged with that offense.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been indicted by the Grand Jury for the First Degree

Murder of Nancy A. O'Farrell. -

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been arrested for the First Degree Murder of Nancy A. O'Farrell.

But for the arrest of a charge of Carrying A Concealed Firearm, the accused would not have been in custody at the Marion County Jail prior to February 3, 1981.

But for the arrest on a charge of the First Degree Murder of Nancy A. O'Farrell, the accused would not have been in custody at the Marion County Jail subsequent to February 3, 1981.

But for the detention of the accused at the Marion County Jail, State witnesses Theodore Chavers and Theophilus Carson would have had no custodial contact with the accused from which testimony of "purported" statements could arise.

But for the unlawful stop and frisk herein, no criminal charges would have been filed against the accused.

As a basis for Defendant's arguments cited above, this Court should consider certain legislative and Constitutional matters in determining whether this particular "stop and frisk" was permissible under our laws.

A. The "Stop".

The most recent Florida Constitutional Amendment which must be dealt with is Article I, §23, Right to Privacy, which states:

> "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. ..."

Article I, §12 of the Florida Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures ... shall not be violated ... Articles or information obtained in violation of this right shall not be admissible in evidence."

Florida Statute §901.151 was enacted by the Florida Legislature subsequent to the United States Supreme Court decision of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It has been suggested by many that F.S. §901.151 was simply the Florida Legislature's codification of the U. S. Supreme Court opinion in Terry. Whether it codifies Terry or not, it was and is the legislature's continued attitude as to such encounters.

Since F. S. §901.151 was enacted the U. S. Supreme Court had occasion to revisit and expound on Terry in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). It should be noted that Justices Brennan, Douglas and Marshall dissented in Adams, feeling that any broadening of Terry was necessarily unconstitutional. Adams' major expansion of the Terry doctrine was that it held the reasonable cause for the stop need not be based on the officer's personal observations.

Justice Marshall in the Adams dissent cited basic principles of constitutional law from Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) which must be dealt with in resolving every search issue:

> "The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions'. The exceptions are jealously and carefully drawn and there must be 'a showing' by those who seek exemption ... that the exigencies of the situation made that course imperative. 'The burden is on those seeking the exemption to show the need for it'."

The Adams decision unnecessarily expanded the jealously drawn exception to the constitutional warrant requirement established in Terry. Adams allowed a Terry detention based on the facts of that case alone and recognized there could be cases where reasonable cause for stop could be based on information provided by a, known-to-be-reliable informant.

Adams did not alter F.S. 901.151; Adams did not consider Article I, §12

or Article I, §23 of the Florida Constitution and Adams did not alter the substance of Terry, which continues to hold:

> "... a policeman making a reasonable investigatory stop may conduct a limited protective search for concealed weapons WHEN he has REASON TO BELIEVE that the suspect is armed AND dangerous." (emphasis added by writer)

As distasteful and as seemingly unconstitutional as the majority holding in Adams might appear to some, it is the law of the land. It is not the last expression of the law in this area. The Fifth Circuit Court of Appeals had occasion to deal with a stop and frisk based on information supplied by an unnamed informant in U.S. v. McLeroy, 584 F.2d 746 (5th Cir. 1978). The McLeroy opinion dealt with the reliability of the information to justify the reasonable suspicion for the stop. The Court made the following rulings:

> An officer may stop a driver of an automobile if he reasonably concludes that criminal activity is afoot; and
>
> In some cases corroboration by the officer of innocent detail supplied by an unnamed informant might change an otherwise unsubstantial tip into a proper basis for reasonable suspicion of criminality to justify investigatory stop; but
>
> Where, as in McLeroy, the officer observed nothing suspicious and the only information supplied by the informant and corroborated by the officer was the accused's name, address, and description of automobile, REASONABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT DID NOT EXIST TO JUSTIFY THE STOP. (emphasis added)

Before such a stop is justified the officer must reasonably conclude in light of his experience that criminal activity may be afoot. More specifically the officer must be able to point to specific and articulable facts which taken together with reasonable inferences from those facts justify the threshold stop. McLeroy citing; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 30 L.Ed.2d 612 (1972); U.S. v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); U.S. v. Hall, 557 F.2d 1114 (5th Cir. 1977) cert. den. 434 U.S. 907, 98 S.Ct. 308, 54 L.Ed.2d 194 (1977).

The McLeroy decision recognized that corroboration of innocent detail by the officer, coupled with his personal observation of apparently lawful activity, cannot justify the initial stop. Naturally, where the stop is not justified, the frisk cannot be justified and all evidence seized must be suppressed. The essence of McLeroy is stated in the last sentence of the opinion where the Court states:

> "Reasonable suspicion requires more than this minimal corroboration of innocent detail" U.S. v. Devita, 526 F.2d 81 (9th Cir. 1975)

This principle of law was reiterated by the Fifth Circuit Court more recently in U.S. v. Rasor, 599 F.2d 1330 (5th Cir. 1979).

The United States Supreme Court has had opportunities to deal with "stop and frisk" matters since Adams. In Ybarra v. Illinois, 100 S.Ct. 338 (1979), interesting observations by the majority in that case are as follows:

> "The Terry case created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court has been careful to maintain."
>
> (Under Terry) "... an officer, for his own protection and safety may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted."
>
> "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' ..."
>
> "The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked..."

In Dunaway v. New York, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) the Court recognized that before Terry, the requirement of probable cause was an absolute prerequisite to a seizure.

Probable cause is defined as 'the facts and circumstances within their knowledge and of which they had reasonable trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed'. Brinegar v. U.S., 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). The Dunaway decision recognized "probable cause" as:

"the best compromise that had been found accomodating the often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in seeking to give fair leeway for enforcing the law in the community's protection."

Though Dunaway acknowledges that "Terry" detentions do not require full blown probable cause, Terry detentions are serious constitutional infringements, to-wit:

"... even this type (Terry detention) of necessarily swift action predicated upon the on-the-spot observations of the officer on the beat, constituted a serious intrusion upon the sanctity of the person which may inflict great indignity and arouse strong resentment."

Apparently ignoring its own opinion in Adams the Dunaway decision held that because Terry involved an exception to the general rule requiring probable cause; this Court has been careful to maintain its narrow scope. The Court established a narrowly drawn authority to permit a reasonable search for weapons where the officer has reason to believe that he is dealing with an armed AND dangerous individual.

In footnote 11 of Dunaway, the Court referred again to the very limited nature of Terry, stating that the statement that police officer believed that his safety or that of others was in danger must be objectively reasonable based on reasonable inferences from known facts so that it can be tested at the appropriate time by the more detached, neutral scrutiny of a judge.

Dunaway continues to stress the importance of the Fourth Amendment by citing Henry v. U.S., 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959) which held the requirement of probable cause has roots that are deep in our history. Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' were not adequate to support a warrant..."

Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 679 (1969) which was decided after Terry and cited with approval in Dunaway, warned:

> "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed 'arrests' or 'investigatory detentions'."

The narrow scope of a Terry detention as limited by the Federal Constitution should be further narrowed under the Florida Constitution in light of Article I, §23 and Article I, §12 as well as Florida Statute 901.151. Stops which might be considered legal under Federal constitutional standards could be considered illegal under Florida constitutional and statutory standards.

The Florida Supreme Court in Hetland v. State, 387 So.2d 963 (Fla. 1980) recognized the general principle that a valid stop and frisk may be based on information obtained from an anonymous tipster IF that information appears sufficiently reliable because of the surrounding circumstances and the nature of the information given in the tip itself. The Hetland decision resolved a conflict which had existed in the District Courts of Appeal as to whether a stop could be based on an anonymous tip. The Supreme Court adopted the Second District Court opinion in State v. Hetland, 366 So.2d 831 (Fla. 2nd DCA 1979) also recognizing that "an inflexible rule based on the anonymous nature of the tip would not be appropriate in all instances without regard to the circumstances involved.

The District Court in Hetland made a very limited ruling which held a stop is not invalid per se because information is supplied by an informant and that the stop on the facts of that particular case was proper. The Court defined the terms "stop and frisk", to-wit:

"stop" - a temporary investigative detention of an individual short of arrest.

"frisk" - the pat down of an individual's outer clothing to determine whether he was carrying a weapon, a procedure not amounting to a complete search.

The District Court succinctly stated what all other writers on this subject had found difficult to articulate:

> "As a matter of constitutional law, the validity of the initial stop is crucial in determining whether evidence seized as a result of the stop is admissible in a subsequent prosecution of the person "stopped" and
>
> "The validity of a stop and the validity of a frisk are assessed separately, but a frisk can NEVER be upheld if the initial stop was improper."

The Florida Courts in Hetland set forth their interpretation of Terry as follows:

> "The basic Terry principle is that a stop is permissible if based on a reasonable suspicion that criminal activity is afoot, and a frisk of the person stopped is permissible if the officer has reason to believe that the person stopped is armed and dangerous. Thus, under Terry, a frisk following a stop is not automatically permissible."

The Federal Courts have recently attempted to establish a test by which the validity of a stop and frisk can be measured. Three cases during 1980-81 dealt with whether reasonable suspicion for an investigatory stop existed. In United States v. Mendenhall, 446 U.S. 544 (1980), three justices found there to have been a "seizure" in an airport terminal detention but found reasonable suspicion, emphasizing that for a trained law enforcement agent, reasonable suspicion can be based on knowledge of methods of criminal activity, knowledge of the personal characteristics of those involved, and knowledge of the particular area. None of these factors seem to have been present in the instant case, however. Additionally, in Reid v. Georgia, 448 U.S. 438 (1979), the court refused to accept a drug courier profile and totally innocent behavior as reasonable suspicion. Finally, in United States v. Cortez, 101 S.Ct. 690

(1981), the court emphasized:

> "an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity". 101 S.Ct. at 695.

The Court pointed out that the totality of the circumstances must be considered in assessing this objective manifestation, including:

1. Objective observations of the officers.
2. Information from police reports.
3. Operational patterns of certain kinds of suspects.
4. Geographic area characteristics.
5. Logical inferences based on all of the above.

None of these factors were present to any extent in the instant case.

The Fourth District Court of Appeals of Florida also discussed such a test in Lachs v. State, 366 So.2d 1223 (Fla. 4th DCA 1979). In Lachs, the Court upheld a stop where the information was supplied by a known but unnamed informant and set forth the following test for law enforcement.

1. Is a crime in progress or about to be committed?
2. Is the activity to be investigated on an unusual day of the week for that activity?
3. Is the exact location of the crime given?
4. Is a specific description given of the suspect's appearance?
5. Is there another reasonable explanation for the suspect's behavior?
6. Is the vehicle being operated in an unusual way?
7. Is there something unusual or incongruous about the anonymous tip?
8. Is the informant an eye witness to the suspicious activity?

Lachs also conceded that not all of the above factors must be present to justify a stop, but, the more present, the stronger the argument for using the

tip. 9 Stetson Law Review 513 (1980); Criminal Law: Validity of an Anonymous Tip for a Stop; appropriately editorialized that "any approach less concrete than the specific test used in Lachs will lead to arbitrary and inconsistent decisions in determining the validity of a stop based on an anonymous tip".

The Second District Court again dealt with this matter after Hetland in State v. Klepfer, 392 So.2d 275 (Fla. 2d DCA 1980); again the Court demonstrated its thorough understanding of a Terry stop in Florida by holding:

> "The standard by which to judge an investigatory stop of an automobile is whether the law enforcement officer had 'a well founded suspicion' that the occupant of the vehicle might be involved in criminal activity", citing its prior decisions of Taylor v. State, 384 So.2d 1310 (Fla. 2nd DCA 1980), Mock v. State, 385 So.2d 665 (Fla. 2nd DCA 1980), State v. Baxter, 378 So.2d 1339 (Fla. 2nd DCA 1980).
>
> An anonymous tip can provide the 'well founded suspicion' to justify an investigatory stop if the information carries sufficient indicia of reliability", citing Hetland.

The Fourth District Court of Appeals upheld the validity of a stop in State v. Amerson, 392 So.2d 311 (Fla. 4th DCA 1980) while acknowledging that though probable cause is not required to justify a temporary detention, something more than mere suspicion is required. Citing its earlier decision of State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978) for the proposition that:

> "To justify temporary detention only 'founded suspicion' in the mind of the detaining officer is required... A 'founded suspicion' is a suspicion which has some factual foundation in the circumstances observed by the officer, when these circumstances are interpreted in light of the officer's knowledge. 'Mere' or 'bare' suspicion, on the other hand cannot support detention... Mere suspicion is not better than random selection, sheer guesswork, or hunch, and has no objective justification."

The Stevens opinion had given examples of circumstances not giving rise to founded suspicion.

1. Merely driving around town in an out of state van, or
2. Walking along a street late at night, or
3. Looking or pointing at a policeman, or

4. Pulling out of a parking lot when police come into view.

While the opinion in Franklin v. State, 374 So.2d 1151 (Fla. 3rd DCA 1979) held that race is a factor to be considered in arriving at a founded suspicion, lateness of the hour alone cannot justify a stop by an officer, Boal v. State, 368 So.2d 71 (Fla. 2nd DCA 1979). Only a "bare" suspicion rather than a founded suspicion is present where a person is riding a bicycle slowly through a residential area in the very early morning hours, and as such does not justify a stop, Mullins v. State, 366 So.2d 1162 (Fla. 1978).

B. The "Frisk".

If the initial stop is invalid then all evidence that flows therefrom is illegally obtained. Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Whitley v. State, 349 So.2d 840 (Fla. 2nd DCA 1977) agreed that if the stop is not valid, any evidence resulting from the stop is inadmissible. Whitley explains that Florida law requires prior to a valid stop the officer be aware of circumstances which reasonably indicate that the person to be detained has committed, is committing, or is about to commit a criminal violation.

Florida recognizes a justifiable stop does not automatically give rise to a justifiable frisk. Schnick v. State, 362 So.2d 423 (Fla. 4th DCA 1978); State v. Lundy, 334 So.2d 671 (Fla. 4th DCA 1976); Hetland, supra. If the stop is valid, then the validity of the frisk must be determined. Once a person is properly detained under Terry, the officer must have probable cause to believe that such person is armed and dangerous before the officer may frisk such person, Perry v. State, 296 So.2d 505 (Fla. 3rd DCA 1974); Ingram v. State, 364 So.2d 821 (Fla. 4th DCA 1978).

Naturally, what the frisk reveals cannot justify the frisk after the fact. Specifically Schnick held that a search absent probable cause that the detainee was armed and dangerous cannot be legalized by the fact a pocket knife was found.

Each stop must be evaluated on the particular facts, circumstances and reasonable inferences therefrom known to the officer either from his own personal observations or from reliable second hand information prior to such stop. If the stop is not legally justifiable all evidence must be suppressed.

Only after a legally justifiable stop need one address the problem of the legality of the frisk. Assuming arguendo a stop is valid then the officer must have probable cause to believe the detainee is both armed and dangerous.

Unless the stop is based on well founded suspicion and the frisk based on probable cause to believe the detainee is both armed and dangerous, all evidence resulting therefrom must be suppressed.

C. The "Seizure".

The United States Supreme Court has had recent occasion to discuss when the detention or seizure of a person occurs. United States v. Mendenhall, 446 U.S. 544 (1980). Therein, Justices Stewart and Rhenquist, in a split 2-3 majority opinion, defined seizure as "when by means of physical force or a show of authority, (a citizen's) freedom of movement is restrained." 445 U.S. at 553. Both Justices state as long as someone who is being questioned believes he is free to leave, there has been no intrusion upon a person's liberty. However, the test under the circumstances is an objective one; whether a reasonable person under the circumstances would have believed that he was not free to leave. This majority opinion has been adopted by the Georgia Supreme Court in State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981). Thus, in the instant case, under the definition of Mendenhall, the defendant was not only subject to a stop and frisk but an unconstitutional seizure of his person as well. No reasonable person could assume Lightbourne was free to leave Officer McGowan's presence at a time during which the officer had his (defendant's) driver's license in hand and was conducting a radio warrant check regarding him.

Furthermore, in general, courts have held that where, however, modest and limited initial restraint lasts beyond the few moments necessary to ask a few questions, the Fourth Amendment requires that probable cause exists if such continued detention is to be legal. A case which is, in some respects, on-all-fours with the instant case is United States v. Chamberlin, 609 F.2d 1318 (9th Cir. 1979). Therein, an officer, who was familiar with the defendant's extensive criminal record, saw him and a companion, who also had an extensive record, flee as they saw the officer. The defendant was stopped-and lawfully so-according to the court. He gave an evasive answer to the officer's initial questions, so he was placed in a patrol car. He remained there for almost 20 minutes as the officer sought to find the companion and investigate further. Although the court commended the officer's actions as "reasonable, good faith police work," it found the defendant's detention to have been unconstitutional, because no probable cause to arrest existed. This same restraint without probable cause is present in the instant case.

As additional authority for the legal arguments presented herein, the court's attention is directed to the cases which are recited without discussion in the Appendix.

Thus, given the facts in the instant case as recited above and as applied to the law as outlined above, Defendant's Motion to Suppress should have been granted.

POINT VII

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

At trial the Defendant argued, pursuant to Florida Rule of Criminal Procedure 3.190(i) that the Court should have suppressed from introduction into evidence against him the following, to-wit:

Appendix 34-37

Excerpts of testimony at hearing
on motion to suppress testimony
(Investigator Fred LaToree; re:
Theophilus Carson)

MR. SIMMONS: Let's --

MR. BURKE: Are we all through or do you have any --

MR. SIMMONS: Since the Motion in Limine and the Motion to Suppress are kind of other and the Motion in Limine involves Theophilus Carson, let me ask the Officer several questions about Theophilus Carson.

THE COURT: Okay.

REDIRECT EXAMINATION

Q (BY MR. SIMMONS): Mr. LaTorre, did there come a time when you had a discussion with Theophilus Carson --

A (BY THE WITNESS): Yes, sir.

Q -- with regards to information about Ian Lightbourn having information about the O'Farrell homicide?

A Yes, sir.

Q All right. How was that conversation -- or how were you brought in contact with Theophilus Carson?

A Investigator Bob Joyner with the Ocala Police Department contacted me and advised me that he had some information concerning an individual at the jail that had some information concerning Ian Lightbourn and the O'Farrell homicide.

Q As a result of that did you get in touch with Theophilus Carson?

A Yes. I asked Mr. Joyner to set up an appointment

for me to interview what turned out to be Theophilus Carson, which I did.

Q Prior to that did you know Theophilus Carson?

A No, sir.

Q Prior to your speaking with Theophilus Carson, were you -- or do you have knowledge of anyone being in touch with Theophilus Carson for the purpose of becoming an agent of the State and obtaining information from Ian Lightbourn?

A No, sir.

Q All right. Was any money offered to Theophilus Carson, to your knowledge, for the purpose of obtaining information?

A No, sir.

Q Did Theophilus Carson ever receive any money for the information that he did give you?

A Not to my knowledge.

Q To your knowledge, was any consideration given to the period of incarceration or the charge that Theophilus Carson was in jail under?

A Not to my knowledge.

Q Did you discuss with anyone, either a private attorney or anyone in the State Attorney's Office, the possibility of giving Theophilus Carson some type of consideration in return for the statement that he gave you?

A Not giving him any consideration; I discussed his

case.

Q And what was the first -- Who did you discuss his case with?

A Al McLemore, an Investigator for your office.

Q What was the purpose of discussing his case?

A To see what his case was and how long he was due to be in jail, that sort of thing.

Q Just general background information about what he was in jail for?

A Yes, sir.

Q Did you discuss with Al McLemore or anyone in the State Attorney's Office the possibility of giving him consideration for his cooperation or his statements that he had given to you?

A No, sir. During the questioning of what his case was and that sort of thing, I was advised by Mr. McLemore that he was in touch with the Defendant's attorney and that they were at that time discussing a plea bargain in reference to his case.

Q All right. Did you ask him to see that some consideration in the plea bargain be given him in return for his cooperation?

A No, because he had already -- the process had already started. I figured there was nothing I could --

Q All right. In any way was Theophilus Carson an

agent of yours or the State's, whose job it was to obtain information from Ian Lightbourn?

MR. FOX: Objection; calls for a legal conclusion. That's the whole issue of the motion.

Q (BY MR. SIMMONS): All right. Do you know what an agent is?

A (BY THE WITNESS): Yes.

Q What's your understanding of what an agent is?

A Somebody that would be acting at my direction or authority.

Q All right. I think the question was: To your knowledge, or do you have any information that Theophilus Carson was working as your right-hand, so to speak, or under your direction or anyone's direction for the purpose of obtaining information from Ian Lightbourn?

A Not to my knowledge.

MR. SIMMONS: That's all I have.

MR. BURKE: Your Honor, we have not deposed Mr. Carson. We have not filed a motion to point with regard to the suppression of Theophilus Carson at this juncture; therefore, I don't think -- since we don't have a motion before the Court -- perhaps this evidence is being preserved when we do, if we do; perhaps that's the reason for it, also for the Motion in Limine --

THE COURT: I think that's what the reason is for.

Appendix 38-47

Excerpts of trial testimony of
Theophilus Carson

assume. He has been deposed.

BY MR. FOX: That's correct. We withdraw that objection.

BY THE COURT: We took a break and you deposed this witness and this witness will now testify. Bring the Jury in.

(Thereupon, the Bailiff returned the members of the Jury to the courtroom at 11:25 a.m., after which the following proceedings were held in the presence of the members of the Jury):

THEOPHILUS CARSON,

being first duly sworn by the Clerk to tell the truth, being called as a witness in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

Q (BY MR. SIMMONS): Would you state your full name, please, sir?

A (BY THE WITNESS): Theophilus Renee Carson.

Q Mr. Carson, I'm going to ask you to scoot your chair forward and pull that mike forward and ask you to speak slowly and distinctly so that this gentleman back here and the Jury can hear you; all right, sir?

A Okay.

Q What is your address, Mr. Carson?

A 715 Humphry, Tampa.

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Q And how old are you?

A 25.

Q Have you ever been incarcerated in the Marion County Jail?

A Yes, I have.

Q And when was that?

A I was incarcerated from November 24th up to March 3rd.

Q March 3rd of what year?

A 1981.

Q All right. While you were in the Marion County Jail, did you have occasion to come to know an individual by the name of Ian Lightbourn?

A Yes, I did.

Q You see him seated in the courtroom?

A Yes, I do.

Q Would you point him out, please?

A Sitting over there. (The witness points).

Q Sitting between the two gentlemen who just talked to you?

A Yes, sir.

BY MR. SIMMONS: All right. Would the record reflect that the witness identified the Defendant.

BY THE COURT: Yes.

Q (BY MR. SIMMONS): Where were you and what cell

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were you in, Mr. Carson, when you came to know Mr. Lightbourn?

A (BY THE WITNESS): Cell Eight.

Q Now, where is that, upstairs or downstairs?

A It's located upstairs.

Q Do you recall the approximate date that it was that you and he were placed in the same cell?

A Well, it was -- it be on the 18th.

Q Of what month?

A February.

Q Of this year?

A Right.

Q Any particular reason why you recall that date?

A Because it was on a Wednesday -- was on a Wednesday, February 18th. The following Tuesday I talked with Mr. LaTorre. That was on the 24th.

Q All right, but you and Mr. Lightbourn were first placed in the cell together on about February 18th?

A Yes, sir.

Q Did you know him before that?

A No, I didn't.

Q Had you even heard of him before that?

A No, I didn't.

Q Had some time prior to that -- well, strike that. Did you ever have any discussions with Mr. Lightbourn?

A Yes, I did.

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Q Did you and he get to know each other very well?

A Yes, we did.

Q Did you happen to play chess together?

A Almost every day.

Q All right. Did you ever discuss with him the problems you had and why you were in jail?

A Yes, we discussed each other's problems.

Q All right. Did he discuss with you the problems of why he was in jail?

A Yes, he did.

Q All right. What did he initially tell you about why he was in jail?

A Well, he referred to -- well, they had him for -- had him arrested for attempted murder, and he referred to it as shooting -- I believe it was -- well, he called it "bitch", shooting a bitch.

Q Well, what did he tell you about -- did he mention to you or ever relate to you any type of involvement?

A Yes, he did.

Q -- in what he was charged with?

A Yes, he did.

Q What did he tell you?

A Well, he told me he messed it up with the necklace. He forgot to take the pendant off the necklace, and he had took some money from the lady and he had sex with her. He

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made her have sex with him.

Q Did he tell you where this happened?

A At her house.

Q Did he tell you how he got in the house?

A No, he didn't.

Q Did he tell you anything about her reaction or what she did?

A What do you mean?

Q All right. Did he tell you what this lady did when he came in the house?

A She screamed, hollered.

Q All right. Did he tell you how much money he got?

A No, he didn't.

Q Tell us again exactly what he told you; as -- as best you can recall, tell us exactly what he said about this necklace and pendant.

BY MR. FOX: Objection, asked and answered.

BY THE COURT: Overruled.

BY MR. SIMMONS: Your Honor, awhile ago I asked him to give us a general purview of what was said and now I'm just asking him what was specifically said.

BY THE COURT: Objection overruled.

Q (BY MR. SIMMONS): As best you can remember, Mr. Carson, tell us exactly what he told you about the necklace and the pendant.

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A (BY THE WITNESS): Well, he told me he messed it up. He didn't take the pendant off of the chain. That's how they recognized it, ran a trace on it.

Q Did he indicate to you at that time that the police knew where the pendant was or the necklace was?

A No.

Q Did he indicate to you at that time that he had been interviewed by Mr. LaTorre?

A Yes, he did.

Q All right. What, as specifically as you can tell us, did he tell you about having had sex with the lady?

A Well, all he said was that he made her have sex with him.

Q He said he made her have sex with him?

A Uh-huh.

Q Other than the money and the necklace, did he mention anything else?

A Something silver.

Q Did he say what type of silver, silver what?

A No, he didn't say, whether it's money or silverware. He just said something silver.

Q I mean, did he tell you when it was or -- and you don't remember what it was, or did he just say it was something silver?

A Something silver.

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Q Did he ever mention the name of this lady that you were talking about?

A Well, before we -- when we first started talking, her name came up at the beginning of the conversation.

Q Do you remember what that name was?

A O'Farrell.

Q All right. So he mentioned the name O'Farrell to you?

A Yes.

Q Did he -- when he was talking to you about these things, Mr. Carson, how was he reacting to the fact that he had messed up and hadn't taken the pendant off the necklace and these other things?

A Well, he seemed nervous, shook up.

Q All right. Did he tell you what else, if anything, he did to the lady or with the lady?

A No, that's it.

Q Now, did he mention anything to you about a gun?

A Yes.

Q What did he say about a gun?

A .25 automatic.

Q What did he say about a .25 automatic?

A Well, that was the gun he shot the lady with and he had bought it from a foreman -- used to be a foreman at the Stud Farm.

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Q Did he tell you what the man's name was?

A Yes, but I forgot.

Q All right. He said he shot the woman?

A Right.

Q Did he tell you why he shot the woman?

A Well, she could identify him.

Q Mr. Carson, what charges were you in the jail for at the time you were in this cell with Lightbourn, I think you said from November until sometime in March?

A Accoessory to grand theft.

Q All right. Now, when you got out of jail on March 3rd, how is it that you came to get out of jail?

A Well, the State really didn't have strong enough charges because the witness that they had had told them I wasn't the one. They gave me time served.

Q All right. Did you have an attorney?

A Mr. Bradley.

Q All right. Now, do you know whether Mr. Bradley had worked out some type of an agreement with the State for disposition of your charges?

A Well, disposition --

Q -- a plea bargain or something like that?

A Well, we had a plea bargain before all this occurred. All right. This was about -- before I talked to Lightbourn. This was about a week -- they had come to me

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with time served.

Q All right. In other words, that plea bargain had already been struck before you ever had this conversation with Mr. Lightbourn?

A Yes.

Q Now, you indicated that you had been placed in this cell with Lightbourn on about February 18th. I think you said it was a Wednesday?

A It was Wednesday.

Q How did you -- did you ever relate this information to anyone with the Sheriff's Department?

A Mr. LaTorre.

Q All right. Now, how did you come to get the message to him that you needed to talk to him?

A Mr. Bob Joyner.

Q Now, who is Mr. Joyner?

A He worked for the Ocala Police Department.

Q Now, what does Mr. Joyner have to do with it; how did he get involved?

A Well, I first -- after our little conversation, I first contacted the Ocala Police Department thinking that all of them worked together, right, and I was referred to Mr. Bob Joyner --

Q All right.

A -- and then he referred me to Mr. LaTorre.

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Q All right. Now, you were first placed in the cell with Mr. Lightbourn on Wednesday, February 18th, and I think you said it was the next Tuesday that you talked to Mr. LaTorre?

A Right.

Q Is there any reason why you didn't go right straight to Mr. LaTorre and tell him this story?

A No.

Q You got ahold of Mr. Joyner and Mr. Joyner got ahold of Mr. LaTorre?

A Right.

Q When you talked to Mr. LaTorre through Mr. Joyner, did you do that voluntarily --

A Yes.

Q -- or had information been solicited by someone from you?

A I did it voluntarily.

BY MR. SIMMONS: You may inquire.

CROSS EXAMINATION

Q (BY MR. FOX): Mr. Carson, in reference to when you gave a statement to Investigator LaTorre, how soon before that had you talked to Mr. Bradley, your attorney, about your case?

A (BY THE WITNESS): About seven days, say a week.

Q Did you talk to Mr. Bradley on the 23rd of

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Appendix 48-67

Excerpts of trial testimony of
Theodore Chavers

February -- I mean January, around about the 28th when he was in the cell. I was in G-2, which was a cell that --

Q All right; let's back up a minute. Did you know him before that?

A Oh, yeah, on the streets. I'd seen him.

Q All right, and how long ago did you first meet him or first know who he was?

A When I really came in contact with him to really know him was when he came to jail. I had seen him on occasion on the West Side.

Q All right; so you just knew him to know who he was?

A Yeah.

Q All right. While you were in the County Jail, were you ever in a cell with him?

A Yes, sir.

Q Do you know when it was that you and he were first placed in a cell together?

A No, sir; he was in the cell before I came there.

Q All right. Do you know approximately when it was that you were placed in a cell with him?

A Around the 29th of January.

Q All right. Prior to the 29th were you in the County Jail?

A Yes, sir.

Q What cell were you in?

A I was in Eight upstairs and I moved downstairs because I was having a disagreement with the fellow in the cell, which is G-2, which is a holding cell when they first put you when you first come in the jail. So they didn't have a TV in there; so I requested that I be moved next door where there was a TV at; was Lightbourn and Larry Emanuel was in the cell together.

Q All right; so you moved from downstairs into one cell --

A Right.

Q -- and you requested that you be moved over next door where there was a TV?

A Yes, sir.

Q And you say Mr. Lightbourn was in that cell?

A Yes, sir. Well, he wasn't in there the day I came in. He said he had been out talking to some investigators about Ms. O'Farrell's murder.

Q All right; but, anyway, after you and he were in the cell together, did you and he have any conversations together?

A Yes, sir; he sat right beside me.

Q All right, and who else was in the cell?

A Well, it was me, him, Larry Emanuel, Rick Carnegia and a couple of other guys. One was from Lowell. He had assault charge on an officer out there, and there was two or

three more just drifting in, you know; little misdemeanor charges.

Q All right. Now, what sort of things did you and he talk about, Mr. Chavers?

A Well, Ian told me that --

BY MR. FOX: Objection, based on the pretrial matters that have previously been argued, ask the Court to incorporate by reference all of those arguments, all of that evidence and all of that law.

BY THE COURT: The Court will so do and overrule the objection. Go ahead.

Q (BY MR. SIMMONS): What sort of things did you and he talk about, Mr. Chavers?

A (BY THE WITNESS): Miss O'Farrell.

Q All right.

A And that the investigators had been there to investigate him and said that he might be the one that killed the lady. The murder weapon that he have might be the one that killed the lady.

Q Well, what did he say about that?

A Well, he just told me about it at that moment.

Q All right, and what did he have to say about that particular matter and the investigators having talked to him?

A Oh, come to find out, had no investigators talked with him.

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THEODORE CHAVERS,

being first duly sworn by the Clerk to tell the truth, being called as a witness in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

Q (BY MR. SIMMONS): Would you state your name, please?

A (BY THE WITNESS): Theodore Chavers.

Q Mr. Chavers, I'm going to ask you, if you will, turn that -- pull that microphone towards you. I think the other one, the top one, and ask you to speak slowly and distinctly enough so that this gentleman back here in the corner can hear you. All right, sir?

BY THE COURT: Wait a second. Mr. Chavers, pull your chair up a little closer. That's good; that's fine.

Q (BY MR. SIMMONS): Mr. Chavers, where do you live?

A (BY THE WITNESS): Right now I'm previously incarcerated at the County Jail.

Q All right, and how long have you been incarcerated in the County Jail?

A About a month and a half.

Q How old are you, Mr. Chavers?

A 28.

Q And how long have you been in Marion County?

A 28 years.

Q Prior to having been in the County Jail for the past month and a half, were you previously in the County Jail?

A Yes, sir.

Q Prior to being in the County Jail, Mr. Chavers, you ever have occasion to know an individual by the name of Ian Lightbourn?

A Yes, sir.

Q Do you see him seated in the courtroom?

A Yes, sir.

Q Would you point him out, please?

A (The witness points).

Q The individual seated between --

A The two lawyers.

Q -- Mr. Fox and Mr. Burke?

A Yes, sir.

Q Do you know Mr. Fox and Mr. Burke?

A Sure.

BY MR. SIMMONS: All right. Would the record reflect that the witness has identified the Defendant.

BY THE COURT: Yes.

Q (BY MR. SIMMONS): When and where did you first meet Mr. Lightbourn?

A (BY THE WITNESS): It was about the end of

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A This was before I called Mr. LaTorre that he was telling me how clean this job was and how it was done to a professional.

Q Done like a professional job?

A Yes, sir.

Q All right, and when was it that he was telling you about having had sex with the lady?

A It was three or four days after they had formally charged him, fingerprinted him and everything and Mr. LaTorre and them kept talking to him, you know, investigating him.

Q All right. Did -- you mentioned something that the investigators might have said, but did Ian Lightbourn ever tell you that he had removed anything from that house?

A No, he never did tell me he removed anything.

Q All right. Did he tell you whether or not he killed the lady?

A No, sir.

Q All right. Now --

A Well, excuse me. In so many ways he said the investigators said that he killed her; so he might as well killed her. He said you all had to find him guilty of it.

Q But he didn't say to you, I killed the lady, or I shot the lady, or anything like that?

A No, sir; he didn't say that, no.

Q All right. Now, how long were you in the cell

with Lightbourn? I think you've mentioned you moved in the cell with him; there were these conversations?

A Uh-huh.

Q There was a period of time when you're aware that Mr. LaTorre interviewed him, and I think you said that three or four days later he made some other statements to you. How long did you remain in the cell with Ian Lightbourn?

A About a week. They moved him upstairs after they formally charged him.

Q All right. Were you ever in a cell with him after that?

A No, sir.

Q Now, Mr. Chavers, you've told us that you made a statement to Mr. LaTorre. Do you recall what day of the week it is that you called Mr. LaTorre?

A It was on Sunday evening. It was maybe about eight o'clock.

Q All right.

A Well, I didn't call him. The officer -- like I said, the officer had to call him for me because he can't give me his number.

Q But you had the officer call him?

A Yes, sir, I had the officer call him for me.

Q And did you actually talk with Mr. LaTorre?

A Yes, sir.

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Q Now, Mr. Chavers, did you receive some money from the Sheriff in return for the information that you gave to Mr. LaTorre?

A Yes, sir, but that was after I got out of jail.

Q All right. When did you get out of jail?

A I think it was around February 10th.

Q Now, at the time you had called and were talking to Mr. LaTorre, were you serving a sentence?

A Yes, sir.

Q And when would that sentence have been up or finished?

A February 29th.

Q All right, and it was about -- do you remember about the day of the month that you had called and were talking to Mr. LaTorre?

A Yeah, it was around about the 28th of January.

Q All right. Now, you told us a few minutes ago that you're back in jail now?

A Yes, sir.

Q Why are you in jail now?

A For just driving while my license suspended.

Q You got caught driving with your license suspended?

A Yes, sir.

BY MR. SIMMONS: Thank you. You may inquire.

- - - - -

CROSS EXAMINATION

Q (BY MR. FOX): Mr. Chavers, at the time you were released from custody after relaying this information to Investigator LaTorre, were you in jail for reasons other than serving a sentence?

A (BY THE WITNESS): Was I in jail for other -- any other reason for serving a sentence, no, sir.

Q Isn't it true you had some pending charges that were also holding you in jail?

A Well, I had resisting arrest and theft charge.

Q Okay --

BY MR. SIMMONS: Excuse me. What kind of charge?

BY THE WITNESS: Theft. I was out -- I was out on bond on it, though.

BY THE COURT: What kind of charge did you say?

BY THE WITNESS: Theft.

BY THE COURT: Oh, theft.

Q (BY MR. FOX): Okay. Did Investigator LaTorre get your bond reduced on those charges?

A (BY THE WITNESS): Nobody get my bond reduced. I posted five hundred dollar fine for my theft charge. I had a five thousand dollar bond, Mr. Fox.

Q Thank you, Mr. Chavers.

A Yes, sir.

Q Now, what were you in jail for at that time?

A I was in jail for driving while my license was suspended.

Q And you are in jail now for --

A The same offense.

Q Happened at the same time or two different occurrences?

A Two different times.

Q Okay. Now, you said that you were down there in the cell and Mr. Lightbourn was down there in the cell, and you ended up being moved into his cell because you wanted a television set?

A No, sir, because there wasn't no television set in G-2. It was in the repair shop.

Q Okay. The cell that you moved into where Mr. Lightbourn was --

A Right.

Q -- did that have a television in it?

A Sure did.

Q And the reason the jailers moved you to that cell was because --

A Of the TV.

Q -- your request?

A Of the TV.

Q Because you wanted a TV?

A Of the TV. I wanted to watch TV, look at it.

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Q You wanted to watch TV. Did they leave anybody in the cell that they transferred you out of?

A Yeah.

Q Who were they?

A I don't know.

Q Don't know any of them?

A No; I told you that was just a holding cell.

Q How long were you in there?

A Overnight; one day and out the next day.

Q And has it been your experience in the past that you'll be moved into a cell where there's a TV if that's what you want?

A No, not really. I just wasn't in for punishment or anything; so I felt like I should be able to look at TV and, just like I said, the cell that I was in, G-2, was just a holding cell. You don't stay in them no more than a day or two.

Q How long had you been in jail?

A I had been in jail about four months.

Q That's a long day or two, is it not, Mr. Chavers?

A Sir? I said "jail", not the cell, that cell, particular cell, G-2. I was upstairs in Number Eight and I also was a trustee.

Q How long had you been in the cell without the TV?

A A day.

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#2

Q How did you happen to be moved from upstairs to downstairs to that cell?

A Because of a dispute I had with a guy in Cell Eight.

Q Who was that guy in Cell Eight?

A Ferguson, Bobby Ferguson.

Q Okay. When you actually moved into the cell where Mr. Lightbourn was, he was not present?

A No, sir. He's supposed -- he said he was talking to the investigators.

Q All right. Did you believe that when he told you that?

A I don't know; I wasn't outside with him.

Q Were you out at Ocala Stud Farm when Nancy O'Farrell was killed?

A Mr. Fox, you ought to be realistic. I was in jail. I told you I was in jail four months.

Q Did you believe him when he said he was in Miss O'Farrell's residence?

A What?

Q Did you believe Ian Lightbourn when he told you he was in Miss O'Farrell's residence?

A I figure anything is possible.

Q Okay. Now, you said that you -- well, let me ask you this.

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A Uh-huh.

Q In your discussions with Mr. Lightbourn, did you happen to find out whether or not he had ever been in jail before?

A I didn't ask him that.

Q Do you know whether he had or not?

A No. I'm telling you, I didn't ask him. I wasn't concerned about that.

Q What were you concerned about?

A What he was telling me about Ms. O'Farrell.

Q Isn't it true you were more concerned about getting yourself out of jail than anything else?

A I haven't been promised nothing.

Q You said that you became suspicious because Mr. Lightbourn knew more than the investigator; right?

A He told me every detail.

Q How did you know what the details were?

A From him.

Q How did you know what the investigators knew?

A How did I know what the investigators knew?

Q Yes.

A I didn't know; Lightbourn said.

Q Okay. How did you know, then, he knew more than they did?

A Wait a minute; say what?

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BY MR. FOX: As soon as you testified you were a witness.

BY THE COURT: We've got that straight.

(Thereupon, the following proceedings were held within the hearing of the members of the Jury):

BY THE COURT: Okay.

Q (BY MR. FOX): Mr. Chavers, you said you had a problem with Bobby Ferguson and that's why you moved downstairs. What was the nature of that problem?

A (BY THE WITNESS): About the telephone.

Q About the telephone?

A Yes, sir.

Q He wouldn't let you use it; you wouldn't let him use it, or --

A No; he'd just get on it and wanted to use it all the time. That's all.

Q Okay. Now, when you moved into the cell with the TV, that was at your request. What officer did you request that consideration from?

A I just didn't request it. I asked.

Q Oh, all right. Which officer did you ask?

A Sergeant Ross.

Q And is he the one who authorized the move?

A Yeah.

Q And did he move you the same day you asked?

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A Well, it was the next day, the next morning -- or evening.

Q Okay; all right, and that move, that was the move that first put you in the same cell with Mr. Lightbourn; correct?

A Yes.

Q Was Larry Emanuel already in that cell?

A Yes, sir.

Q Now, did you ever make a statement to -- in this case to Investigator LaTorre that in the cell Mr. Lightbourn was acting obnoxious?

A Well, he was acting very -- you know, like he was upset about something, I don't know.

Q How long had you known Ian Lightbourn before you met him in the cell?

A Before -- I just -- I don't know. I can't even recall just how long. I just had seen him on the West Side.

Q Did you ever -- would you consider him a friend of yours?

A No, sir, not really.

Q Ever have any discussion with him?

A No, sir.

Q And you ever have occasion to see how he acted out on the street?

A None other than just seeing him, smoking reefer

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A (BY THE WITNESS): Well, when they run the bullet statistics and showed that that was the gun that killed her and found the jewelry and everything, what would you say?

Q Okay. How did you find out that they ran a test on the bullet and found out that was the gun?

A From him.

Q When did he tell you that?

A After they had formally charged him.

Q How did he know that?

A I guess they told him.

Q Investigator LaTorre ever tell you that?

A No, sir; Ian told me.

Q Now, when you first came in contact with each other there in the cell the first time, who started the conversation, you or he?

A He started it.

Q He did?

A Yeah, I told you he said that he had been out talking to some investigators.

Q Did you ever find out where he had really been?

A No, I didn't -- he said outside, outside the cell somewhere.

Q Okay, but you said that he really wasn't out talking to investigators; true?

A No, I didn't say that he wasn't. I said that he

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was.

Q When Mr. Simmons was questioning you, I think, didn't you say that Ian told me he was out talking to the investigators, but he really wasn't?

A I was saying that Ian had said that he had been out talking to the investigators, but come to find out the investigators hadn't never talked to him.

Q Okay.

A So I don't know what he was out for.

Q Okay. How did you find out that the investigators hadn't talked to him?

A After I talked with them.

Q Them being who?

A Mr. LaTorre down at the jail.

Q Did you ever say when Mr. Lightbourn came in the cell, you can talk to me?

A Did I ever say that? No, I said -- I made the statement as -- if you have some troubles, man, I might could be of some help to you.

Q Okay, and what did you expect, did you expect that he would talk to you?

A No; I was trying to get him to say that if he didn't kill the lady, what he doing with the gun and the jewelry. He ought to tell who done it. I would.

BY MR. FOX: I'll just note my objection and motion

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for the record. I think the grounds therefor speak for themselves.

BY THE COURT: Overruled.

Q (BY MR. FOX): What was his response when you first started talking to him about this -- this case, the gun, her, things of that nature?

A (BY THE WITNESS): He was talking about if he had a pistol he'd blow LaTorre's and them head off. He told me he asked them for his pistol down at the place down there and they wouldn't give it to him.

Q Was he acting like he wanted to talk a lot or he didn't want to talk?

A Oh, he was talking a lot. They had charged him with murder.

Q Did you ever tell Investigator LaTorre that Ian said to you some -- when you said, is something bothering you, that he said, no, I'm scared to talk?

A Yeah.

Q Well, when did he say those kinds of things?

A When I was telling him about it. I told him if he -- he wasn't the one that killed the lady, he ought to tell them, tell the people who done it.

Q Did you ask him if he knew who done it?

A Yeah, I asked him.

Q What did he say?

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A-65

A (BY THE WITNESS): Uh-huh.

Q And then you further testified that you were also awaiting trial on two charges, one for resisting arrest with violence and also theft; is that correct?

A Yeah.

Q You also indicated in your testimony that you were a trustee prior to that; is that correct?

A Uh-huh.

Q Why were you not a trustee at the time when this conversation occurred?

A Because they had charged me with escape.

Q Okay, and did you have some conversations following your testimony -- or your conversations with Investigator LaTorre, did you have occasion to go to the State Attorney's Office?

A No, sir. I went over there -- it wasn't concerning that. I went over there about my resisting arrest and -- that charge.

Q And did something happen on those charges?

A No, I haven't went to trial on them, yet.

Q Were you released on your own recognizance on those charges?

A On the escape.

Q Wasn't it all of them?

A No, I posted a five thousand dollar bond to Mr.

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Baillie.

Q In other words, you did go to the State Attorney's Office, is that correct?

A Yeah.

Q And was that in the company of police officers?

A Yeah.

Q Fred LaTorre, to your knowledge, ever talk to the State Attorney on your behalf?

A No, sir.

BY MR. BURKE: I don't have any further questions.

BY MR. SIMMONS: The State has no further questions.

BY THE COURT: Thank you, Theodore. You can go now.

(Thereupon, the witness left the courtroom).

BY MR. SIMMONS: The State calls Theophilus Carson.

BY MR. FOX: Your Honor, might we approach the bench while we're awaiting the arrival of this witness?

(Thereupon, Counsel for the respective parties to the cause approached the bench and the following proceedings were held out of the hearing of the members of the Jury):

BY MR. FOX: Your Honor, reference to Mr. Carson, he was listed by the State as a witness sometime prior to trial. We attempted to subpoena him in Tampa on March 19th for deposition, 1981, and I believe, as I

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Appendix 68-77

Excerpts of testimony at hearing
on motion to suppress evidence
(Officer James McGowan)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARION COUNTY.
CRIMINAL ACTION.

CASE NO. 81-170

STATE OF FLORIDA,
Plaintiff,
vs.
IAN LIGHTBOURN,
Defendant.

FILED
SEP 4 4 42 PM '81
CLERK CIRCUIT COURT
MARION COUNTY, FLA.

PROCEEDINGS: Motion Hearing
(Refer to Index)

BEFORE: The Honorable William T. Swigert
Circuit Judge
Fifth Judicial Circuit of Florida
Ocala, Florida 32670

PLACE: In Chambers
Marion County Courthouse
Ocala, Florida 32670

DATE AND TIME: April 6, 1981, 2:05 p.m.

REPORTED BY: Michael R. Edwards, CP, RPR,
Deputy Official Court Reporter
Fifth Judicial Circuit of Florida
Ocala, Florida 32670

APPEARANCES: Albert C. Simmons, Esq.
Attorney at Law
Fifth Judicial Circuit of Florida
Ocala, Florida 32670
-and-
Lewis Stone, Esq.
Assistant State Attorney
Fifth Judicial Circuit of Florida
Tavares, Florida 32778
Attorneys for the State

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not be destroyed until --

THE COURT: Until this case is completely over with, counting appeals and so forth and so on.

MR. SIMMONS: That's all the questions I have of this witness.

THE COURT: Okay.

MR. FOX: I have no further questions of this witness.

THE COURT: You're excused. Next witness.

MR. SIMMONS: Would you ask Mr. McGowan to come in?

(Mr. Coley Campbell left the courtroom, after which James McGowan entered.)

JAMES McGOWAN,

called as a witness by the State, having first been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. SIMMONS): Would you state your name and occupation, please, sir?

A (BY THE WITNESS): James McGowan, Ocala Police Department.

Q Were you with the Ocala Police Department on January 24th of this year?

A Yes, sir.

Q At approximately eight o'clock in the morning did you have occasion to be dispatched to a particular scene in

Ocala?

A Yes, sir.

Q Would you tell us what that dispatch was for and what you did as a result of it?

A I was dispatched to the area of Southwest 23rd Avenue at First Street, reference to a suspicious vehicle and person call.

Q All right. Now, Officer, is that what is typically known as a Signal 13 and Signal 13P?

A Yes, sir.

Q All right. When you are dispatched pursuant to a Signal 13 or a Signal 13P -- In police jargon what does that mean?

A Basically, it's a vehicle in an area that doesn't -- it looks out of place, basically.

Q Doesn't necessarily connote to you suspicion of criminal activity?

A No, sir.

Q All right. Now, did you, as a result of this dispatch, go to the location which you have previously mentioned?

A Yes, sir.

Q Did you happen to encounter any other individuals at the scene who gave you any information about a suspicious person or a suspicious vehicle?

A Yes, sir, I did.

Q And who was that individual?

A I didn't get his name. I was coming up First Street, and there was a black male at the intersection of First and 23rd Avenue there, and he waved me down, and he pointed at the vehicle which was up on 23rd Avenue, and he asked me to check the vehicle out; this guy might be sick or something.

Q All right. Specifically, what did he say to you, as specifically as you can remember it?

A Well, that was basically it, sir, what I just said. He said that vehicle had been in the area. "I would like you to check it out. The guy might be sick", or, "I've never seen the vehicle".

Q All right.

A He may have been the complainant; I have no idea.

Q As a result of that encounter did you go to the vehicle which he pointed out to you?

A Yes, sir.

Q All right. And when you got to that vehicle, what did you find?

A I found Mr. Lightbourn sleeping in the front seat, driver's side.

Q Is that Mr. Lightbourn the same individual seated at the hearing table with Counsel?

A Yes, sir.

Q Now, as you approached the vehicle, tell the Court how you approached it, with regard to which side you --

A I come up on the vehicle. It was partially obstructing the street, so I positioned my vehicle behind his car, just northwest of it, in a northeasterly angle to angle myself, so I was behind the vehicle when I got out of my vehicle.

Q And which side of the vehicle did you approach?

A I approached his driver's side.

Q And when you got up to the driver's door, what did you see?

A I observed Mr. Lightbourn. He appeared to be sleeping.

Q All right. What was his position in the car?

A He was kind of leaning towards the door like this, covered up with blankets -- a blanket.

Q What portions of his body was covered with blankets or a blanket?

A When I come up on him, basically, his hands. He was just cuddled up. Hands and lap.

Q All right. His hands and lap were covered with the blanket?

A Yes, sir.

Q All right. Now, -- and as you approached him,

what did you do?

A I tapped him on the shoulder, and he responded.

Q All right. Now, then what happened?

A I asked him for some type of identification, and Mr. Lightbourn gave me his driver's license.

Q All right. Did you have any discussion with him?

A Yes, sir.

Q And what was that discussion?

A Basically, his reasoning for being in the area.

Q All right. And what was his response?

A He was -- He advised me that he just left a friend off up around the block and that he was just sleeping off a drunk, rather than proceed home or proceed wherever he was going. I don't believe he said home.

Q All right. Did you ask him any other questions?

A On his driver's license there was a post office box 818, and I needed to know, you know, what his residence was, you know, why he was in this area. The post office box 818 is a post office box, and I wanted to know a street, and he advised me it was the Ocala Stud Farm, and I asked him if he still lived there or worked there or whatever, and he advised me that he used to work there, that he no longer was employed at that Farm.

Q All right. Now, as you were asking these questions, was he still in the position which you had

originally found him?

A No, he sat up. He come up, and the cover was kind of like on the right side of his arm, to cover his right part of his leg in the middle of the seat.

Q When you say "cover", are you talking about the blanket?

A Yes, sir.

Q Did any other officer come to that particular scene?

A Yes, sir, my Supervisor, Sergeant Becker.

Q Now, as you were asking these questions of Mr. Lightbourn, were you able to observe what he was doing?

A He was doing an awful lot of moving. He was fidgeting, moving his right arm a lot like he was impatient or something. He wanted to do something.

Q All right. Now, Officer, as a result of what you observed, whatever actions Mr. Lightbourn was taking -- Or let me phrase the question like this: As a result of the actions that Mr. Lightbourn was taking, his fidgeting, however you described it, did you, as a result of those actions, become alarmed in any way?

MR. FOX: Objection, leading and presumes the ultimate issue we're supposed to be resolving at this hearing. I don't know that my objection does much good at this point, but I'll make it for the record.

THE COURT: It is a leading question. Sustained.

Q (BY MR. SIMMONS): All right. As a result of the action that you observed Mr. Lightbourn taking, what did you think?

A (BY THE WITNESS): I immediately felt there was something wrong, and I asked him to remove himself from the vehicle.

Q Why?

A Something just wasn't right. I -- The cover -- The blanket was concealing him and his arm, and I just felt that my safety was in danger, and I just wanted him to remove himself from the vehicle immediately.

Q All right. Is that the reason you asked him to remove himself from the vehicle?

A Yes, sir.

Q All right. And did he remove himself from the vehicle?

A Yes, sir.

Q And when he got out of the vehicle, what happened?

A I asked him to turn around and face the car, and I patted him down.

Q Now, why did you do that?

A Basically, for my own protection at this point.

Q What gave rise to your worrying about your own safety?

A The fidgeting and his movements and his concealment and just -- I just didn't feel right with him. I felt there was something wrong, and I just removed him from the vehicle. I figured he was attempting to conceal something from me because the blanket was over his right arm and his leg.

Q Now, when you patted him down, what if anything did you find?

A I felt a hard object in his right pocket, and I reached in there and pulled out a .25 caliber, RG .25.

Q Now, which pocket?

A Right pocket.

Q Pants pocket?

A Jacket pocket, sir.

Q All right. When he removed himself from the vehicle, could you see that firearm?

A No, I didn't.

Q All right. But you felt it when you patted him down?

A Yes, sir.

Q As a result of discovering the firearm, what action, if any, did you take?

A I immediately placed Mr. Lightbourn under arrest for carrying a concealed weapon and advised him of his Rights and placed him in my patrol car.

Q Now, are you the officer that actually placed Mr.

Lightbourn under arrest for carrying a concealed weapon?

A Yes, sir.

Q All right. At what point did you actually place him under arrest?

A At the time I found the gun.

Q After he was out of the car?

A Yes, sir.

Q And after you had discovered the firearm?

A Yes, sir.

MR. SIMMONS: I don't have anything else of this witness.

CROSS EXAMINATION

Q (BY MR. FOX): Officer McGowan, at the time you searched this gentleman's person did you have a warrant to conduct that search?

A (BY THE WITNESS): It was a pat-down, sir; not a search.

Q Did you have a search warrant to search this gentleman?

A No, sir.

Q Did you have a search warrant to search his car?

A No, sir.

Q Did you have a warrant to arrest this gentleman?

A No, sir.

Q Did you ask him if you could search his person?

Appendix 78-83

Excerpts of testimony at hearing
on motion to suppress evidence
(Sergeant Emil Becker)

P R O C E E D I N G S

MR. SIMMONS: Morning, Judge.

THE COURT: Is he sworn in?

MR. SIMMONS: No, sir.

EMIL JUAN BECKER,

called as a witness herein by the plaintiff, having been first duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. SIMMONS): Will you state your name, please, sir?

A (BY THE WITNESS): Emil Juan Becker.

Q And your occupation?

A I am a police officer, City of Ocala.

Q And what is your position?

A I'm a sergeant, line supervisor.

Q Were you on duty at approximately 8:00 a.m. on January the 24th, 1981?

A I was, sir.

Q Acting in your capacity as a police officer on that date, and approximately that time, did you have occasion to encounter Officer McGowan?

A Yes, I did.

Q What was the initiation of that contact with

Officer McGowan?

A Well, the police radio dispatch had put out a call, assigning him to go and investigate a signal 13-P, which is our jargon for a suspicious person, in a vehicle, which is called a signal 13. And gave an address out which was ultimately in the 2300 block of Southwest First Street.

Q Before you go any further, let me ask you this: In the jargon that you mentioned, what does "signal 13" mean?

A Well, it's -- signal 13, without the letter P, stands for a vehicle; and a P would just mean a person.

Now, what that entails is that there is some reason to question the presence of the vehicle or the person at -- where they are at.

Q Does it necessarily connote criminal activity?

A No, sir, it does not.

Q Now, go ahead and tell us about your contact with Officer McGowan.

A Okay. I was going to go to the call, since I was on that side of town. In fact I went to where I thought I had heard the address, and when I got there, there was nothing and no one there, including the officer. And I assumed that he had already been there and I just missed it. And apparently the vehicle was what we call GOA, which means gone on arrival.

So I left and went back out onto Broadway and was headed eastbound, back into town, which is Highway 40.

And at about the 1800 block of Broadway I passed Officer McGowan, who was going westbound, and I proceeded eastbound. Shortly thereafter I heard him checking out a 10-97, which is this signal 13-F.

Q Does that mean he was at the scene there?

A Yes, sir, 10-97 means he's there.

So I called him and asked him where he was at. And he gave me the address, which I had in fact misinterpreted the first time around. I then turned around and went back to the area where he was at.

Q When you approached the area, what did you see?

A As I drove up to the position where they were located, the officer was standing outside the driver's door of Mr. Lightbourn's vehicle.

Q All right. Now, where did you park your vehicle in relation to Mr. Lightbourn's vehicle?

A All right, sir, Mr. Lightbourn's vehicle was facing southbound on 23rd Avenue, on the wrong side of the road.

23rd Avenue is a dirt road, very secluded area; it's a very narrow road with trees hanging out in certain places.

And as I approached, I pulled my vehicle on the

wrong side of the road, facing northbound, and stopped approximately 15 feet or so -- with the front of my vehicle in front of his vehicle.

Q All right. What did you then do?

A All right. As I first drove up and stopped my cruiser, I could observe Mr. Lightbourn through the windshield of his car. And he seemed to be figiting around.

At that time I exited my vehicle, and from a standing-up position, outside of my car, I could look down through the windshield. And I saw that Mr. Lightbourn had some type of a blanket covering his lap and his arms, and it came up to about here (indicating) on his body.

Q You are indicating approximately mid chest?

A Yes, sir.

Q Now, how was he positioned in his vehicle?

A He was seated behind the steering wheel, in a normal driver's position. The actions that he was going through aroused immediate concern for myself and Officer McGowan.

Q Would you describe what those actions were?

A Yes, sir. To the best of my ability to describe it, he was moving in the vehicle as though he was either trying to put something in a pocket, or perhaps taking something out of a pocket. There was a lot of body movement, like this (indicating), and his hands going somewhere

underneath the blanket. I was --

Q All right. Now, what, in your mind, Officer -- or what did those actions mean to you?

A Well, sir, in my opinion, after being in this for 12 years and just being naturally cautious, the man at 8:00 o'clock in the morning on a lonely, deserted street, making furtive movements with his body concealed, spelled danger for me and my officer. And I had figured that at that point I should get him out of that car and find out whether or not he had some type of weapon on him.

Q All right. Now, when you saw those actions, and the thoughts that you have just described went through your mind, what did you do?

A I immediately started running toward the car, and ordered Officer McGowan to get him out of the car. In fact as I recall my words, to the best of my ability, was, "Get him out of the car right now."

Q You started running toward the car?

A Yes, sir, I was running toward the car.

Q All right. And what did Officer McGowan do?

A He immediately was getting him out of the vehicle. I went down from my position -- my quickest route would have been to go down the passenger's side of the vehicle, which I did, around the rear, and come up on the side that Officer McGowan was on, which is what I did.

Q And what then occurred?

A By the time I got up to the car, Officer McGowan had already started the process of getting him out, and he was like about half in and half out of the car.

At which time Officer McGowan performed a pat-down of the vehicle's (sic) exterior clothing and felt a bulge in his jacket pocket --

MR. FOX: I am going to object. I don't see how he knows what Officer McGowan felt, and move to strike.

THE COURT: Sustained, granted.

Q (BY MR. SIMMONS): What part, if any, did you take in participating in this, if you did?

A (BY THE WITNESS): I took no physical part.

Q All right. How close were you to Officer McGowan when he was patting the defendant down?

A Perhaps a foot and a half, two feet.

Q And you observed Officer McGowan conduct the pat-down?

A Yes, sir, I did, sir.

Q Did you observe Officer McGowan produce any type of weapon from the person of the defendant?

A Yes, I did, sir.

Q And what was that?

A It was a .25 automatic, taken from his right

Appendix 84-90

Excerpts of trial testimony of
Officer James McGowan

BY THE COURT: Mr. Simmons?

BY MR. SIMMONS: Nothing further, Your Honor.

BY THE COURT: You're excused; thank you.

(Thereupon, the witness left the courtroom).

BY THE COURT: Who's next?

BY MR. SIMMONS: J. L. McGowan.

JAMES L. McGOWAN,

being first duly sworn by the Clerk to tell the truth, being called as a witness in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION

Q (BY MR. SIMMONS): Would you tell us your full name, please, sir?

A (BY THE WITNESS): James L. McGowan.

Q Mr. McGowan, how are you employed?

A I'm a Patrolman with the City of Ocala, Police Department.

Q Were you a Patrolman on January 24th of this year?

A Yes, sir, I was.

Q Do you recall, Officer McGowan, your whereabouts at approximately 8:00 a.m. on January 24th of this year?

A Yes, sir; I was at Southwest 23rd Avenue and Southwest First Street investigating a suspicious vehicle call.

Q All right. Did you go there in response to a

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dispatch?

A Yes, sir, I did.

Q And when you got there, what if anything did you observe?

A I came in contact with a 1974 Chevy Chevelle occupied by a black male.

Q All right, and what if anything out of the ordinary did you observe with regards to that Chevelle and/or that black male? First of all, why were you dispatched; what was the reason for your dispatch?

A In reference to a suspicious vehicle call.

Q All right, and when you got there you encountered a '74 Chevelle?

A Chevelle, sir.

Q And after encountering that Chevelle, what did you do?

A It was occupied by a black male. I immediately notified the dispatcher that I would be out with the vehicle, and I got out of the vehicle and proceeded to the vehicle and came in contact with the black male who appeared to be sleeping.

Q You say he appeared to be sleeping?

A Yes, sir.

Q And in what portion of the automobile was he sleeping?

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A He was in the driver's seat.

Q All right, and how was he clothed or -- as he was sleeping?

A He was clothed. He had cream colored pants on, brown leather jacket, light brown shirt, and he was covered up with a blanket.

Q Now, what, after making these observations, did you do, Officer McGowan?

A After waking up the black male that was sleeping in the vehicle, I immediately requested some type of identification from him, which he gave me his Florida driver's license.

Q Do you know from where he produced that driver's license?

A No, sir, I don't recall.

Q Let me show you, Officer, what has been introduced into evidence as State's Exhibit Number 11, ask you to look at it.

A (The witness examined the Exhibit).

Q -- and tell us if it looks familiar to you?

A Yes, sir; it appears to be Mr. Lightbourn's driver's license.

Q Have you ever seen that driver's license or a similar such license before?

A I've seen a similar one.

Q That appears to be a photocopy, does it not?

A Yes, sir, it does.

Q All right. Where did you see the one that was similar to it?

A I seen it at the scene when Mr. Lightbourn produced it to me.

Q All right. Did you have occasion to compare the photograph on the driver's license which he produced with him? Did you compare the photograph of the individual depicted on the driver's license with the individual who had given it to you?

A Yes, sir. I -- as soon as I looked at the picture, I looked back to Mr. Lightbourn.

Q Did they appear to be the same?

A Yes, sir.

Q All right. Do you see the same individual in the courtroom today?

A Yes, sir, I do.

Q And where is he?

A Sitting over there. (The witness points).

Q At Defense Counsel next to Mr. Fox?

A Yes, sir, to his left.

BY MR. SIMMONS: Would the record reflect that the witness has identified the Defendant.

BY THE COURT: Yes.

BY MR. FOX: I'll object to the record so reflecting. He indicated that the Defendant was seated to the left of Mr. Fox.

BY THE COURT: That's true, but he meant his left. Which side of Mr. Fox is he seated?

BY THE WITNESS: In between --

BY MR. SIMMONS: -- Mr. Fox is his left --

BY THE WITNESS: He's to Mr. Fox' right; my left.

BY THE COURT: That's good. Let the record --

BY MR. FOX: I'm sure that that would be correct.

Q (BY MR. SIMMONS): You're not talking about Mr. Stone here, are you?

A (BY THE WITNESS): No, sir, I'm not.

Q All right. Now, after taking possession of the driver's license, Officer, what if anything did you observe? As you were observing the driver's license, did you have occasion to observe what the Defendant was doing?

A He appeared to be fidgety, moving around. His right arm and leg was still concealed by the blanket and his right arm was moving all the time, and I was running a check -- a criminal check on the individual at this time.

Q How were you doing that?

A Basically, we give the individual's name and date of birth and whether he's a white male or a black male and run it through our computer.

Q Well, physically, how did you get that message to wherever it goes?

A From a portable outside my vehicle.

Q And where were you when you observed the Defendant partially covered by this blanket and fidgeting and doing the things you've described; where were you?

A I was standing on the driver's side.

Q Of whose vehicle?

A Mr. Lightbourn's vehicle.

Q Now, having observed what you just described, Officer, what did you do?

A I immediately asked Mr. Lightbourn to remove himself from the vehicle.

Q Why?

A Due to his fidgeting and his right arm moving around underneath the blanket, I had a general concern for my safety and so I asked the individual to remove himself out of the vehicle.

Q And did he remove himself?

A Yes, sir, he did.

Q And when he removed himself from the vehicle, what did you do?

A I immediately proceeded to pat the subject down. This is basically to -- for my own protection at this point if I wanted to complete my investigation or talk to the

individual as I was.

Q All right, and when you patted him down, what if anything happened?

A As I was patting the individual down, I felt a hard object in his right jacket pocket and I reached in to see what it was and I pulled out a .25 caliber RG .25.

Q All right. Would you describe that --

A I would consider it to be in a poor condition gun, dark in color. It had a black -- tape around its grip and it was -- a cartridge, and that's about it.

Q By the time this was occurring, Officer, was anybody else present or in the immediate area?

A Yes, sir, my supervisor, Sergeant Becker, was there.

Q Now, when had he come upon the scene?

A He arrived at approximately two minutes after I did.

Q And after you conducted this pat-down and discovered this pistol, what did you then do?

A I immediately handed the gun to Sergeant Becker and placed Mr. Lightbourn under arrest and put him in my patrol car and advised him of his Rights.

Q For what reason did you arrest him?

A For carrying a concealed firearm, weapon.

BY MR. FOX: I'd like to object to that and ask